(1)

90-1899

No. 90-___

Supreme Court, U.S.
FILED
JUN 11 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GULF STATES UTILITIES COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WM. WARFIELD ROSS*
RICHARD B. HERZOG
JAMES M. GUINIVAN
PEPPER, HAMILTON & SCHEETZ
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 828-1200

CECIL L. JOHNSON
DONALD M. CLEMENTS, JR.
Gulf States Utilities Company
P.O. Box 2951
Beaumont, Texas
(409) 838-6631

Attorneys for Petitioner
Gulf States Utilities Company

**Counsel of Record*

June 11, 1991

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. The Court of Appeals that reviewed FERC's first decision in this case found that the agency had failed to give a coherent explanation of the agency's construction of its governing statute, and that Court, without ruling on whether the agency's construction is barred by the statute's plain meaning, remanded the case to the agency for further explanation. Did the second Court of Appeals panel reviewing the agency's decision on remand fail to give reasoned consideration to the plain meaning question, as required by principles of judicial review and by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), when it held that the earlier panel implicitly had resolved the plain meaning question by ordering a remand?

2. a. Did the Court of Appeals depart from the accepted and usual course of judicial proceedings in declining to consider Gulf States' contention that the Federal Energy Regulatory Commission had, in effect, authorized what amounts to a retail sale, contrary to the express prohibition of such authorization in the Public Utility Regulatory Policies Act?

b. Did the Court of Appeals' denial of a petition for review of FERC's orders effectively permit FERC to authorize a retail sale of electricity, in spite of PURPA's express prohibition of such authorization, and thereby infringe the reserved powers of the states to regulate retail sales?

LIST OF PARTIES AND RULE 29.1 LIST

The parties in the Court of Appeals were:

1. Gulf States Utilities Company, Petitioner

2. Federal Energy Regulatory Commission, Respondent

3. Union Carbide Corporation, Intervenor

Gulf States Utilities Company is a corporation chartered under the laws of Texas; it has no publicly owned parent, subsidiary, or affiliate.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 29.1 LIST	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
PERTINENT STATUTES AND REGULATIONS	2
STATEMENT OF THE CASE	3
A. Introduction	3
B. Course of Proceedings and Disposition Below	7
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	17

TABLE OF AUTHORITIES

	Page
CASES:	
American Paper Inst., Inc. v. American Elec. Power Serv. Corp., 461 U.S. 402 (1983)	3
Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116 (1985)	12
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	i,9-14
Gulf States Utilities Co. v. FERC, 872 F.2d 487 (D.C. Cir. 1989)	*passim*
Gulf States Utilities Co. v. FERC, 922 F.2d 873 (D.C. Cir. 1991)	*passim*
Puerto Rico Elec. Power Auth. v. FERC, 848 F.2d 243 (D.C. Cir. 1988)	15
Rust v. Sullivan, 59 U.S.L.W. 4451 (1991)	12
Union Carbide Corp., 40 F.E.R.C. (CCH) ¶ 61,337 (1987)	2
Union Carbide Corp., 41 F.E.R.C. (CCH) ¶ 61,348 (1987)	2
Union Carbide Corp., 48 F.E.R.C. (CCH) ¶ 61,130 (1989)	1
Union Carbide Corp., 49 F.E.R.C. (CCH) ¶ 61,178 (1989) (Stalon, concurring)	1
Union Carbide Corp., 49 F.E.R.C. (CCH) ¶ 61,209 (1989)	1-2
Union Carbide Corp., 50 F.E.R.C. (CCH) ¶ 61,195 (1990) (Trabandt, concurring)	2
United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989)	12
CODE OF FEDERAL REGULATIONS:	
18 C.F.R. § 292.101(b) (1990)	2,5
18 C.F.R. § 292.201 (1990)	3

Table of Authorities Continued

	Page
18 C.F.R. § 292.207 (1990)	3
18 C.F.R. § 292.305 (1990)	3,5
STATUTES:	
16 U.S.C. § 796(18) (1988)	2,4
16 U.S.C. § 824a-3 (1988)	2-4,13
16 U.S.C. § 825*l*	7
28 U.S.C. § 1254(1) (1988)	2
MISCELLANEOUS:	
Black's Law Dictionary 531 (5th ed. 1979)	3
Energy Information Administration, U.S. Department of Energy, *Annual Outlook for U.S. Electric Power 1989*	14
Webster's Third New Int'l Dictionary 812-13 (1986)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-_____

GULF STATES UTILITIES COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Gulf States Utilities Company (Gulf States) requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, filed February 15, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-7a) is reported at 922 F.2d 873. The order of the Federal Energy Regulatory Commission (App. 11a-23a) is reported at 48 F.E.R.C. (CCH) ¶ 61,130 (1989), with a concurring opinion (App. 24a-28a) reported separately at 49 F.E.R.C. (CCH) ¶ 61,178 (1989). The order of the Commission denying rehearing is reported at 49

F.E.R.C. (CCH) ¶ 61,209 (1989) (App. 29a-37a), with a concurring opinion reported separately at 50 F.E.R.C. (CCH) ¶ 61,195 (1990) (App. 38a-49a).

The Commission proceedings being reviewed were held on remand from the Court of Appeals for the District of Columbia Circuit, whose earlier decision (App. 50a-57a) is reported at 872 F.2d 487 (D.C. Cir. 1989). That decision in turn was made on a petition for review of a Commission order (App. 58a-68a) reported at 40 F.E.R.C. (CCH) ¶ 61,337 (1987) and an order denying rehearing (App. 69a-74a) reported at 41 F.E.R.C. (CCH) ¶ 61,348 (1987).

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1991. App. 1a-7a. On March 14, 1991, orders were filed in the Court of Appeals denying Gulf States Utilities Company's timely petition for rehearing and suggestion for rehearing en banc. App. 8a, 9a. This petition is being filed within 90 days of those orders. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTES AND REGULATIONS

The following statutory and regulatory provisions are involved in this case:

1. Section 3(18) of the Federal Power Act, as added by section 201 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 796(18) (1988).

2. Section 210 of the Pubic Utility Regulatory Policies Act of 1978, as amended, 16 U.S.C. § 824a-3 (1988).

3. 18 C.F.R. § 292.101(b) (1990).

4. 18 C.F.R. § 292.201 (1990).

5. 18 C.F.R. § 292.207 (1990).

6. 18 C.F.R. § 292.305 (1990).

The listed provision are reprinted verbatim in the Appendix. App. 77a-80a.

STATEMENT OF THE CASE

This case involves basic issues concerning the role of the federal courts in reviewing agency action, and the Federal Energy Regulatory Commission's ("FERC's") responsibilities when it certifies cogeneration facilities under section 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824a-3. *See generally American Paper Inst., Inc. v. American Elec. Power Serv. Corp.*, 461 U.S. 402, 404-07 (1983) (describing regulatory scheme, under PURPA and FERC rules, for qualifying cogeneration facilities).

A. Introduction

The term "facility" in ordinary usage means a single thing or collection of things devoted to a common purpose.[1] In the absence of a statutory definition of "facility," the FERC has ignored the ordinary meaning of the word. FERC certified a "qualifying cogeneration facility" as including, not only a

[1] *See, e.g., Black's Law Dictionary* 531 (5th ed. 1979); *Webster's Third New Int'l Dictionary* 812-13 (1986).

cogeneration plant[2] built on one industrial site and an adjacent industrial plant which consumes cogenerated steam and electricity, but also a second industrial plant, built on a distant site, which will exchange natural gas for cogenerated electricity and whose only other legal connection with the project is that its owner is a co-owner of the cogeneration equipment.[3]

As a result of FERC's decision characterizing these disparate elements as a single facility, petitioner Gulf States Utilities Company ("Gulf States") may be required under section 210 of the Public Utility Regulatory Policies Act ("PURPA"), 16 U.S.C.§ 824a-3 (1988), to provide both consuming plants with valuable services available under PURPA to "qualifying cogeneration facilities," even though the plants are not, in any ordinary sense of the word, a single unified facility serving a common purpose but instead serve

---

[2] "Cogeneration" is the joint production of electricity and thermal energy (usually industrial steam). The Federal Power Act defines a "cogeneration facility" as "a facility which produces . . . electric energy, and . . . steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes." 16 U.S.C. § 796(18)(A) (1988). Upon application, the Commission may certify cogeneration facilities that meet FERC standards as "qualifying cogeneration facilities." *Id.* § 796(18)(B); 18 C.F.R. § 292.207(b).

[3] In this case, the power and steam were to be produced at the site of a petroleum refinery owned by Fina Oil and Chemical Company ("Fina"). The generating plant, located on the site of Fina's refinery, would provide electricity and steam to the refinery, and electricity alone to an industrial gas plant owned by Union Carbide Corporation ("Union Carbide") and located 1.7 miles away. The cogeneration plant would initially be owned and operated by Fin-Lin, a joint venture of Fina and Union Carbide, but may be sold and leased back to the Fin-Lin partnership.

the divergent purposes of their independent owners. The Court of Appeals upheld the FERC certification decision (a) without ever squarely addressing whether the statutory language had a plain meaning that would exclude FERC's construction of it, and (b) although the effect of the agency decision is to bring about a retail sale of electricity, in spite of Congress' reservation to the states of authority over such sales.

Facilities certified by FERC as "qualifying cogeneration facilities" are entitled under PURPA to sell electricity to established public utilities at avoided cost, and to receive "back-up" power[4] from those utilities under favorable terms and conditions. *See* 18 C.F.R. § 292.305. The question presented below was whether FERC could lawfully construe the statutory term "qualifying facility," which is not defined in the PURPA law, to refer not to a single unified physical facility, but to (1) a cogeneration plant located on one manufacturing company's industrial site, (2) that company's industrial plant that consumed power and steam generated by the cogeneration equipment, and (3) a second—separately owned, managed, and located—industrial concern which consumed cogenerated power and whose only other legal connection with the project was an ownership interest in the

---

[4] "Back-up" power is a shorthand term for electric power supplied by the utility to a cogeneration facility. Under FERC regulations, it includes "supplementary power," which is provided to meet that portion of the facility's electric power needs that exceed its regular power output, "interruptible power," provided by the utility and subject to interruption by the utility under specified conditions, and "maintenance power," provided during scheduled outages of the cogeneration facility, as well as "back-up power" in the strict sense, which is provided by the utility during unscheduled outages. 18 C.F.R. § 292.101(b)(8)-(11).

cogeneration plant. In conferring an expansive definition of the term "facility," FERC will enable both independent consuming plants to assert a right to the statutory benefits due under PURPA to a single qualifying facility.

The FERC ruled in an earlier phase of this proceeding that the term "qualifying facility" was broad enough to encompass such an association of elements—which Gulf States had argued would in effect constitute an industrial electric cooperative between Fina and Union Carbide—despite the fact that "facility" in ordinary usage means a single thing or a collection of things devoted to a common purpose. App. 58a-68a. FERC reached its conclusion despite Gulf States' argument that its ruling would encourage the development of industrial cooperatives immunized from state utility regulation, which could idle existing utility capacity with a resulting injury to the broad mass of electric consumers. App. 65a.

On appeal from the initial ruling, a panel of the D.C. Circuit[5] remanded, directing that FERC provide a "*coherent explanation* for its determination that the Union Carbide plant is so integral a part of the Fin-Lin facility as to entitle it to back up power from Gulf States." App. 56a (emphasis added). The Court further noted that "[t]he Commission fails to indicate . . . why it would have been artificial to distinguish the Union Carbide plant from that of its Fina partner, which is adjacent to, and a prospective con-

---

[5] *Gulf States Utilities Co. v. FERC*, 872 F.2d 487 (D.C. Cir. 1989) ("*GSU I*"), reprinted at App. 50a-57a.

sumer of, both forms of energy to be produced by, the Fin-Lin facility." App. 56a.

B. Course of Proceedings and Disposition Below

Following the remand, Fina and Union Carbide moved that the FERC expedite the issuance of a certification order. App. 18a. Gulf States opposed this order on the grounds that new assertions by the applicants would require review by technical and operating personnel, and that a schedule should be established allowing orderly consideration of the new allegations. On July 28, 1989, the FERC, without further proceedings or any response to Gulf States' request, issued an order on remand which once again certified the Fin-Lin facility as a qualifying facility and ruled that the Union Carbide plant constituted an integral part of that facility. App. 11a-23a. In support of this ruling, the FERC said that it had examined four factors (ownership, geographic location, functional characteristics, and a customer-supplier relationship between the applicants) which it claimed supported its conclusion that the Union Carbide consuming plant formed part of the cogeneration facility. App. 19a-23a. Gulf States' petition for rehearing was denied by FERC order of November 17, 1989. App. 29a-37a. Gulf States then sought review in the Court of Appeals, which had jurisdiction under 16 U.S.C. § 825*l*.

Following oral argument, that Court on January 11, 1991, sustained the FERC's order on remand in a brief opinion, stating that the earlier FERC decision had been remanded because "we did not understand why [FERC] had rejected [Gulf States'] argument that the distance between Union Carbide's plant and the cogeneration operation's physical location in combi-

nation with the fact that Union Carbide was taking only electricity, but not steam from the operation, made Union Carbide 'essentially . . . a retail purchaser of surplus electricity.' [citation omitted] What was it about this proposed venture that made Union Carbide's plant 'so integral a part of Fin-Lin facility as to entitle it to backup power from Gulf States?' [citation omitted]" The Court further commented that its inquiry in directing the remand was "what were the limits the Commission perceived to grants of [qualifying facility] status or, to put it another way, what limits were implied by the word 'facility'?" App. 3a.

In sustaining the FERC's order on remand, the Court below first addressed Gulf States' argument that the plain meaning of the English word "facility" "cannot be stretched to include a multiplant operation, particularly where one of the consuming participants is 1.7 miles away." The Court observed that "[i]t would appear, however, that we have already rejected this contention; we would not have remanded for a further explanation of the Commission's determination if we had thought the word 'facility' could not bear the meaning which the Commission gives it in this case." The Court then went on to hold in a cursory observation (quoted immediately below in its entirety) that since the term facility is defined neither in the statute nor in its legislative history, it did not have a plain meaning that would preclude its application to the present arrangement.

> In any event, the word "facility" is not defined in the statute, nor in the legislative history, and we do not think it has a "plain meaning" that would preclude its application

> to this arrangement. Like "stationary source," it is an imprecise term that an administrative agency is given implicit authority to construe, *see Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984), and we must therefore defer to a reasonable interpretation and application of such a term.

App. 4a-5a.

The Court below then moved to the question of whether the FERC's four-factor test (summarized above) was a reasonable interpretation and application of the statute. The Court expressed substantial reservations about the logic and adequacy of the FERC's test, and admitted "that we are not entirely comfortable with the Commission's reasoning"; nevertheless, the Court "defer[red] to [FERC's] rather painful efforts to explain its approval of this application." App. 7a.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals in its opinion below[6] gave only cursory attention to Gulf States' assertion that the statutory term "qualifying cogeneration facility" could not encompass a power consumption facility such as Union Carbide's which was (a) physically separated, (b) under separate ownership and management, and (c) serving a totally different business purpose, from the Fina oil refinery on whose site the cogeneration plant was located. Gulf States contended in its earlier appeal, and before the Court below in

---

[6] *Gulf States Utilities Co. v. FERC*, 922 F.2d 873 (D.C. Cir. 1991) ("*GSU II*"), reprinted at App. 1a-7a.

this proceeding, that the plain meaning of the term "facility" contemplated a physical entity serving a common purpose, and that no such purpose inhered in the wholly separate Fina and Union Carbide manufacturing plants. Gulf States accordingly argued that the Court, under *Chevron*, should reverse the FERC's construction as inconsistent with the congressional intent expressed in statutory language whose meaning was plain *when applied to the circumstances of this case* (whether or not it was plain in all circumstances).

The Court of Appeals in *GSU I* had vacated the FERC's decision and remanded for further explanation without expressly reaching or deciding the plain meaning issue. The Court of Appeals in this proceeding held that it need not address that issue on the ground that "it would appear" that the first panel had decided it by implication. App. 4a. According to the Court, the first panel would not have remanded for a further explanation if it thought that the term "facility" could not bear the meaning which the FERC gives it in this case.

Gulf States is entitled to a disposition by a reviewing court on the plain meaning issue that is both explicit and unconstrained. Neither of the two panels provided such review. The first panel did not express an opinion on the plain meaning issue, and the second panel considered itself constrained on the issue by the first panel's remand.

The resort in *GSU II* to inferences about the earlier panel's decision illustrates the pitfalls in the second panel's approach. The inference drawn by the second panel as to the scope of the first panel's decision is not a necessary or even a probable one. A fair reading of the first panel's opinion suggests strongly that the

Court did not reach the plain meaning issue because of the FERC's egregiously inadequate discussion of all issues in the case. In view of FERC's particularly inadequate opinion, the first panel could reasonably have preferred to provide the agency with an opportunity to try again before deciding whether the result was simply unavailable as a matter of statutory interpretation.[7]

Whether or not correct, the second panel's inference led it to give only the most cursory attention to Gulf States' repeatedly pressed contention that "facility" could not encompass two wholly distinct industrial plants.[8] Accordingly, the Court below did

---

[7] It is unlikely that the first panel would have decided the plain meaning issue *sub silentio*, since it was briefed and vigorously argued during the first appeal. The Court below's holding that a panel *must* decide plain meaning before commenting or ruling on the adequacy of an agency's initial explanation of its decision would place reviewing courts in an unnecessary *Chevron* straitjacket. There is simply no reason as a matter of law why an appellate court may not require an agency further to explain its reasoning, prior to the staged review called for by the *Chevron* doctrine. Such a self-imposed restriction would waste judicial resources and distort the review process by denying an appellate court an opportunity to remand for clarification prior to testing an agency's statutory construction.

[8] Labelling "facility" an "imprecise term," the Court below, without even mentioning Gulf States' argument that no accepted meaning of the term could encompass the disparate entities here involved, concluded that the Commission was given "implicit authority to construe" it, and thus a court should defer. App 4a-5a While the Court does not otherwise explain its conclusion, it is undisputed that an English word can be given different constructions within the accepted limits of its meaning, but still be "plain" enough *in a particular application* to exclude an agency construction at the extremes. This, we submit, is the case here,

not in fact subject FERC's statutory interpretation, which led it to characterize the Union Carbide plant as a part of the qualified facility, to appropriate and required review.

The review process adopted by this Court in *Chevron*, and clarified in *Chemical, Ron Pair*, and most recently in *Rust*[9] involves two steps, the first of which requires an examination of the statute (and, where appropriate, legislative history) to determine whether the agency's construction can be squared with a plain statutory meaning. If not, the agency is acting contrary to the intent of Congress, and the reviewing court need not move to the next level, which contemplates an appraisal of the reasonableness of the agency's interpretation.[10] The Court below, because of its inference, appears to have glossed over the threshold issue of plain meaning and moved directly to the question whether it should defer to the agency.

Since there is a powerful and even compelling argument that the term "facility" cannot encompass two independent industrial corporations whose only pertinent relationship is their joint investment in cogeneration and a retail power sale, there has been a

---

where the term "facility" cannot be stretched to cover two distinct and unrelated entities.

[9] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989); *Rust v. Sullivan*, 59 U.S.L.W. 4451, 4454 (1991).

[10] As this Court pointed out in *Rust*, the inquiry into whether the agency construction is a reasonable one entitled to deference requires examination of "the plain language of the statute." 59 U.S.L.W. at 4454.

failure in substance to follow *Chevron* and its successors, and hence a denial of effective review of FERC's action. The question of the proper application of *Chevron* by a second review panel, after an initial remand, is of substantial importance in defining the proper role of reviewing courts. The question warrants review by this Court.

2. PURPA provides (16 U.S.C. § 824a-3) that the FERC may not authorize a qualified facility to "make any sale for purposes other than resale"; in other words, it may not authorize a retail sale by the cogeneration facility.[11] While the Court of Appeals in *GSU I* had asked FERC to explain on remand why the sale of power to Union Carbide for consumption at its isolated plant was not a "retail sale," the panel below refused to consider this question, stating that it "should be raised first before the state regulatory agency." App. 3a n.1. However, as the FERC's Deputy Solicitor made clear in his November 27, 1990, letter to the Court (after oral argument) (App. 75a-76a), the FERC takes the position that the state agency will have nothing to decide, since qualified facility certification compels the state agency to find that it lacks jurisdiction to regulate Fin-Lin's exchange of electricity for natural gas from Union Carbide.[12] It follows that the Court below erred in

---

[11] A "retail sale" in this context is a sale to another industrial or bulk power user, rather than at wholesale to the utility grid.

[12] The Deputy Solicitor asserted that the Commission has already implicitly decided the retail sale preemption issue; should FERC intervene in a state agency proceeding, therefore, it can be expected to argue that independent consideration of the issue by the state agency would be an impermissible collateral attack on the FERC order. Apart from the arguably preempting effect

concluding that the question of the status of the Fin-Lin/Union Carbide transaction as a retail sale was not properly before it. The reasoning of the two panels is irreconcilable in these respects. The interplay between the certification authority conferred by PURPA, and PURPA's bar on authorizing retail sales, is a substantial statutory question. As with the parallel *Chevron* issue, the effect of the Court of Appeals' decision is to deny effective review of the correctness of the FERC's holding.

3. In addition to the general importance of the questions presented in ensuring that reviewing courts properly perform their functions, the underlying PURPA questions are of substantial importance. Because they transcend the impact of the present FERC decision, effective judicial review of them is all the more important in this precedent-setting case. It is generally agreed that regulated utilities will be unable to build much of the new power generating facilities needed in this decade, and that a substantial part of such new generating capacity will be provided by non-utility cogenerators.[13] Thus, cogeneration has become one of the primary mechanisms for meeting new power supply demands throughout the continental United States, and an accurate reading of PURPA

---

of federal certification, Union Carbide's exchange of natural gas for electric power would clearly constitute a retail sale reserved by Congress to state regulation.

[13] In the decade of the 1990s, non-utilities are projected to build 27 gigawatts (*billion* watts) of new generating capacity and increase sales to utilities to 118 billion kilowatt hours, over twice current levels. Energy Information Administration, U.S. Department of Energy, *Annual Outlook for U.S. Electric Power 1989*, pp. ix-x.

assumes great importance. The FERC's orders here under review (together with those in the earlier *Alcon* proceeding)[14] are the first authoritative construction of the scope of the cogeneration program mandated by PURPA. Since the Court of Appeals in this case has basically declined to review two of the most important legal questions involving the scope of PURPA, the FERC's orders are left standing despite serious and substantial questions as to their validity. The FERC's view of the Act as requiring utility backup to industrial customers whose only pertinent link to the generating plant is an investment therein, and as effectively prohibiting state regulation of transactions which are functionally retail sales of power which the statute forbids the FERC to authorize, will become guiding precedents governing the application of PURPA during a critical period of rapid power development.

In enacting PURPA, Congress attempted to draw a clear line between (a) federal regulation of the cogeneration transaction with respect to wholesale sales of any electricity not consumed by the qualifying facility itself, and (b) continuing state regulation of re-

---

[14] *Puerto Rico Elec. Power Auth. v. FERC*, 848 F.2d 243 (D.C. Cir. 1988) ("*Alcon*"), involved a related but distinct question of whether an otherwise unified cogeneration project was disqualified as a "qualified facility" because ownership of the producing and consuming functions had been segregated solely for financing reasons, a factor not present here. *Alcon* neither compels nor supports the decision below.

If the writ is granted, Gulf States seeks to reserve the right to argue that the Commission's four standards applying PURPA are unreasonable and unworkable, assuming *arguendo* that the plain language of the statute is not dispositive.

tail sale transactions of the kind contemplated here between the Fina-sited generating facility and Union Carbide's nitrogen plant. Indeed, this distinction lies at the heart of the PURPA scheme, which seeks to stimulate cogenerated power production for the producer's own use and sale to the utility grid, and at the same time to prohibit sales to other industrial customers ("retail sales") without state approval. The FERC's distortion of the federal statutory scheme could lead to diversion of a large portion of existing utility industrial load to cogeneration by multi-customer qualifying facilities, a diversion which could compromise the utilities' ability to serve their remaining customers economically. If utilities are forced to raise their retail rates in order to spread their fixed costs over a customer base diminished by multi-industrial-plant cogeneration projects, the adverse effects will be twofold. First, those industrial consumers who can do so will be further encouraged to opt out of service by the utility and to consume cogenerated power from industrial cooperatives. Second, the remaining (largely residential and commercial) consumers, will undergo further economic pressure.

The Court of Appeals' failure to provide meaningful review of two significant questions as to the legality of FERC's interpretation of the scope of PURPA amounts to a failure of judicial responsibility, and so departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

WM. WARFIELD ROSS*
RICHARD B. HERZOG
JAMES M. GUINIVAN
PEPPER, HAMILTON & SCHEETZ
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 828-1200

CECIL L. JOHNSON
DONALD M. CLEMENTS, JR.
Gulf States Utilities Company
P.O. Box 2951
Beaumont, Texas
(409) 838-6631

Attorneys for Petitioner
Gulf States Utilities Company

* *Counsel of Record*

June 11, 1991

APPENDIX

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 19, 1990 **Decided January 11, 1991**

No. 90-1006

GULF STATES UTILITIES COMPANY,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

UNION CARBIDE CORPORATION,
INTERVENOR

Petition for Review of an Order of the Federal Energy Regulatory Commission

---

William Warfield Ross, with whom *Richard B. Herzog*, *James M. Guinivan* and *Donald M. Clements, Jr.*, were on the brief, for petitioner.

Joseph S. Davies, Deputy Solicitor, Federal Energy Regulatory Commission, with whom *Timm L. Abendroth*, Attorney, Federal Energy Regulatory Commission, was on the brief, for respondent. *Catherine Cook*, Attorney, Federal Energy Regulatory Commission, also entered an appearance for respondent.

Philip A. Fleming, with whom *Toni M. Fine* was on the brief, for intervenor Union Carbide Corporation and *amicus curiae*, Electricity Consumers Resource Council urging that the petition for review be denied. *Sara D. Schotland* also entered an appearance for *amicus curiae*.

Edward H. Comer was on the brief for amicus curiae Edison Electric Institute urging that the petition for review be granted. *Peter B. Kelsey* also entered an appearance for amicus curiae.

Before: RUTH B. GINSBERG, SILBERMAN, and SENTELLE, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: This case is here for the second time. Petitioner continues to challenge FERC's grant of "qualifying facility" (QF) status under the Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. § 796(18)(A) (the Act) to a partnership of Union Carbide Corporation and Fina Oil and Chemical Company (Fin-Lin) that would establish a cogeneration operation. Union Carbide will be part owner of the partnership that would operate the cogeneration plant, but the actual running of the day-to-day operations would be done by Fina. Last year we remanded the case to FERC because we did not believe it had adequately explained what constituted a "facility" eligible for QF status under the Act. *Gulf States Utilities Co. v. FERC*, 872 F.2d 487 (D.C. Cir. 1989). FERC tried again and we believe the criteria it announced and applied in this case withstand our review. We therefore deny the petition.

I.

Since the background of the Act (sometimes called PURPA), and the details of the proposed operation are set forth in our previous opinion, we will not repeat them. Suffice it to say that petitioner trains its fire on two circumstances of this partnership. It objects that the power-producing cogeneration unit will be located adjacent to Fina's refinery, which is its power-consuming unit, whereas Union Carbide's power-consuming plant will be located 1.7 miles away and that Union Carbide will take only elec-

tricity from the cogeneration operation, not steam. In other words, Gulf States, the public utility which supplies Union Carbide with electricity, objects to Union Carbide's inclusion under the QF umbrella because it will thereby lose part of its customer franchise. In addition, under FERC's regulations, Gulf States must purchase from the QF any surplus power the QF produces at the utility's avoided marginal cost and provide back-up power to Fina and Union Carbide. *See American Paper Institute v. American Elec. Power Corp.*, 461 U.S. 402 (1983). Gulf States claims that Congress never intended these incentives for the development of cogeneration facilities at the location of a plant that produces energy as a byproduct of its normal operations to be made available through a cooperative venture with another plant some distance away.[1]

We remanded the case to FERC because we did not understand why it had rejected petitioner's argument that the distance between Union Carbide's plant and the cogeneration operation's physical location in combination with the fact that Union Carbide was taking only electricity, but not steam from the operation, made Union Carbide "essentially . . . a retail purchaser of surplus electricity." *Gulf States*, 872 F.2d at 490. What was it about this proposed venture that made Union Carbide's plant "so integral a part of Fin-Lin facility as to entitle it to backup power from Gulf States"? *Id.* In so asking, of course, we were inquiring what were the limits the Commission perceived to grants of QF status or, to put it another way, what limits were implied by the word "facility"?

The Commission, on remand, was somewhat more expansive. It said that in this case it determined that Union

[1] Petitioner also argues that FERC has violated the Act by implicitly authorizing an actual retail sale of power from Fin-Lin to Union Carbide. In *Puerto Rico Elec. Power Auth. v. FERC*, 848 F.2d 243 (D.C. Cir. 1988), however, we said that whether or not that transaction was a retail sale was not properly before us; it should be raised first before us; it should be raised first before the state regulatory agency.

Carbide was an "integral component" by relying upon four factors.

1. Union Carbide was a part owner of the power producing component as well as a consumer.

2. Union Carbides's plant 1.7 miles away is in "close proximity."

3. The power line used to transmit electrical power to Union Carbide is a private line indicating that the Union Carbide plant is a "part of an integrated industrial operation."

4. There was a longstanding supplier-customer relationship between Union Carbide and Fina before they entered into this joint venture. The former sold the latter nitrogen.

Union Carbide Corp., 48 FERC ¶ 61,130, *reh'g denied*, 49 FERC ¶ 61,209 (1989).

II.

Petitioner contends that the Commission's explanation will not do. It argues first that the Commission is ignoring the plain meaning of the word "facility," which cannot be stretched to include a multiplant operation, particularly where one of the consuming participants is 1.7 miles away. It would appear, however, that we have already rejected this contention; we would not have remanded for a further explanation of the Commission's determination if we had thought the word "facility" could not bear the meaning which the Commission gives it in this case. In any event, the word "facility" is not defined in the statute, nor in the legislative history, and we do not think it has a "plain meaning" that would preclude its application to this arrangement. Like "stationary source," it is an imprecise term that an administrative agency is given implicit authority to construe, *see Chevron U.S.A. Inc. v. Natural*

Resources Defense Council, Inc., 467 U.S. 837, 843-45 (1984), and we must therefore defer to a reasonable interpretation and application of such a term.

Of course there remains the question whether the Commission's four factor test is a reasonable interpretation and application of the statute. It is common ground for the parties that the word "facility" is not unbounded. The Commission seems to acknowledge that multiple plants at an industrial park, for instance, could not form a cogeneration joint venture, bound together only by relative propinquity and a shared objective of producing energy more cheaply than the local utility company. Therefore, although Congress did not explicitly set the outer boundaries of a facility eligible for QF status, there seems agreement that a boundary exists even though its outline is only dimly perceived. The Commission understandably does not wish to attempt to draw those boundaries categorically, but rather would prefer to proceed on a case-by-case basis—which an administrative agency is clearly entitled to do. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

Nor can we say that the four factors the Commission relied upon to distinguish this case from other hypothetical situations are not reasonably related to a definition of facility under the Act. We have previously approved the Commission's determination that the owner of the cogeneration power unit need *not* be the same company that consumes the generated energy. *See Puerto Rico Elec. Power Auth. v. FERC*, 848 F.2d 243, 247-48 (D.C. Cir. 1988) (PREPA). But we do not think it irrational for the Commission to look to a common ownership link between the producing and consuming elements where, as here, one of the consuming plants is some distance away.[2] Similarly,

---

[2] The partnership agreement also provides for the possibility of sale-leaseback arrangements by Fin-Lin or either to its two partners. The

the extent of physical separation of the putative facility's parts seems quite relevant to a determination as to whether the parts are "integrated."

Petitioner asserts that the third factor—the private line carrying electricity to Union Carbide—is merely a necessary incident of a QF, not a relevant criterion in determining whether the operation is sufficiently integrated to be regarded as a "facility." We see petitioner's point; presumably, Fin-Lin could not very well ask petitioner to transport electricity to Union Carbide. The private line may not be a true variable which can be used to measure the degree of integration of this operation. Nevertheless, the need for a private line does suggest a real limitation on QF status because only ventures with the land use rights and physical ability to run lines between production and consuming units would qualify. Petitioner would prefer that FERC limit QF status to ventures with consuming units that take steam as well as electricity because steam cannot be transported as far from the production unit as can electricity. That approach might well be reasonable, but FERC did not adopt it and we cannot say that the Commission was obliged to do so. The truth is that the task of measuring the degree of integration between production and consuming units is not susceptible to any bright line rules—petitioner's counsel was not able to suggest one—and therefore we are hardly in a position to reject the Commission's reasoning.

Finally, that Union Carbide is a long-term supplier of nitrogen to Fina may not, as petitioner argues, have any direct bearing on the operation of the cogeneration power

---

Commission expressed its approval of a possible change in ownership for "financial" reasons, *see* 48 FERC ¶ 61,130 at p. 61,506, but our understanding, based on the representation at oral argument, is that the Commission misspoke and meant "financing" reason as similar to those approved in *PREPA*, *see* 848 F.2d at 248-49, and mentioned repeatedly in the Commission's previous decisions in this case.

unit; nevertheless it also serves as a factor which marks off the economic relationship between Union Carbide and Fina as something more than a joint venture for the sole purpose of gaining QF status.

* * * *

To be sure, multifactor tests are subject to manipulation. They often serve more to obscure a tribunal's reasoning than to illuminate it, and thereby do not always cabin a tribunal's future discretion. But the judiciary is hardly in a position to throw stones at the technique. We admit that we are not entirely comfortable with the Commission's reasoning and we certainly do not mean to suggest that the Commission is totally free to bestow QF status on all sorts of loose arrangements of cooperating plants—thereby undermining the customer base of public utilities. But although we are unable to determine the outer boundaries of the statutory concept, it does not appear that the Commission's present decision exceeds the limits of its discretionary authority and we, therefore, defer to its rather painful efforts to explain its approval of this application.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1990

No. 90-1006

GULF STATES UTILITIES COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

FILED MAR 14 1991

BEFORE: Ruth B. Ginsburg, Silberman and Sentelle, Circuit Judges

O R D E R

Upon consideration of petitioner's petition for rehearing, filed February 25, 1991, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1990

No. 90-1006

Gulf States Utilities Company,
Petitioner

v.

Federal Energy Regulatory Commission,
Respondent

FILED MAR 14 1991

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, Circuit Judges

O R D E R

Petitioner's Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judges Wald and Randolph did not participate in this matter.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. QF87-274-003

Union Carbide Corporation

(Issued July 28, 1989)

Before Commissioners: Martha O. Hesse, Chairman; Charles G. Stalon, Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

ORDER ON REMAND

On April 14, 1989, the United States Court of Appeals for the District of Columbia Circuit remanded to the Commission its determination that a Union Carbide Corporation (Union Carbide) plant is part of a qualifying cogeneration facility under the Public Utility Regulatory Policies Act of 1978 (PURPA), and therefore is entitled to back-up power[1] from Gulf States Utilities Company (Gulf States).[2] The court remanded the decision because it found

---

[1] The term "back-up" is used herein, unless otherwise noted, to refer to back-up, maintenance, supplementary, and interruptible power that utilities are required to furnish to qualifying facilities (QFs) under sections 292.303(b) and 292.305(b) of our regulations. 18 C.F.R. §§ 292.303(b), 292.305(b) (1988). These four types of power are defined in sections 292.101(b)(8) through 292.101(b)(11). 18 C.F.R. §§ 292.101(b)(8)-(11) (1988).

[2] Gulf States Utilities Co. v. FERC, 872 F.2d 487 (D.C. Cir. 1989).

that the Commission had failed to adequately explain why Union Carbide is so integral a part of the QF facility as to entitle it to back-up power from Gulf States.[3] The court further urged the Commission to discuss the specific criteria it will apply to identify QFs entitled to backup services under PURPA, to provide guidance for the future.[4]

Section 210(a) of PURPA directs the Commission to adopt such rules as it determines necessary to encourage cogeneration and small power production, including rules that "require electric utilities to offer to . . . sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities . . . ."[5] QFs entitled to such sales of energy are defined in PURPA. Regarding cogeneration, section 201 of PURPA defines a cogeneration facility as "a facility which produces" both "electric energy" and "steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes."[6] Section 201 defines a qualifying cogeneration facility as one which complies with the Commission's regulations regarding operating and efficiency standards and which meets certain ownership criteria.[7] However, neither the statutory definitions nor the Commission's regulations specify whether a qualifying cogeneration facility includes the consuming component of the facility as well as the producing component, and thus whether both are entitled to back-up power.

Pursuant to the statutory mandate to encourage cogeneration, the Commission's regulations require that electric utilities provide QFs with back-up power, as well as other

---

[3] *Id.* at 490.

[4] *Id.* at 491.

[5] 16 U.S.C. § 824a-3(a) (1982).

[6] 16 U.S.C. § 796(18)(A) (1982).

[7] 16 U.S.C. § 796 (18)(B) (1982). *See also* 18 C.F.R. §§ 292.205, 292.206 (1988).

services such as supplementary and maintenance power.[8] In our recent *Alcon* decision, which was affirmed by the United States Court of Appeals for the District of Columbia Circuit,[9] the Commission determined that implicit in its definition of the power services that the utility must provide is the concept that such services must be provided to the consuming component of the QF. Supplementary power is by its nature a service provided to the consuming component of the QF in that it is "electric energy or capacity supplied by an electric utility, regularly used by a qualifying facility in addition to that which the facility generates itself."[10] Maintenance power is provided to replace the QF's generation when the producing component of the QF is not functioning due to scheduled outages.[11] Back-up power is defined as electric energy or capacity supplied by an electric utility to replace energy ordinarily generated by a facility's own generation equipment during an unscheduled outage of the facility.[12] Back-up power replaces the QF's power so that service to the QF's load is not interrupted during a forced outage. Consequently, implicit in the Commission's definition of power services that a utility must provide a QF is a determination that such services must be provided to the consuming component of a QF.

Moreover, in order to foster the Congressional goal of encouraging the development of small power production

---

[8] Section 292.305(b) of the Commission's regulations states that "upon request of a qualifying facility, each electric utility shall provide: supplementary power; back-up power; maintenance power; and interruptible power." 18 C.F.R. § 292.305(b) (1988).

[9] 32 FERC ¶ 61,247 (1985), *reh'g granted in part and denied in part*, 38 FERC ¶ 61,042, *reh'g denied*, 38 FERC ¶ 61,301 (1987), *aff'd sub nom.* Puerto Rico Electric Power Authority v. FERC, 848 F.2d 243 (D.C. Cir. 1988).

[10] 18 C.F.R. § 292.101(b)(8) (1988).

[11] 18 C.F.R. § 292.101(b)(11) (1988).

[12] 18 C.F.R. § 292.101(b)(9) (1988).

and cogeneration, as a practical matter power services must be provided to the consuming component of QF. As the court noted in *Alcon*, "utilities are needed to complement on-site power by providing backup power and by purchasing surplus power."[13] The court further recognized that although the power producing component may need power for station uses, it is the *consuming* component, by definition, that has the primary need for back-up power.[14]

The question presented to the Commission on remand in this proceeding is whether the Union Carbide consuming component is part of a QF, entitling it to back-up power.

Background

Although the Union Carbide factual situation differs from that in *Alcon*, it is useful to review the decision in *Alcon* and the Commission's subsequent reliance on that case in the Union Carbide orders remanded by the court. Alcon owned and operated a pharmaceutical manufacturing plant which used steam and electricity. Alcon satisfied its energy demands through purchases from the Puerto Rico Electric Power Authority (PREPA). However, to reduce costs, Alcon entered into a lease/purchase and service agreement with O'Brien Energy Products, Inc. (O'Brien). O'Brien was to own and operate a cogeneration plant located on property owned by Alcon, and adjacent to Alcon's pharmaceutical plant. Alcon would be the lessee of the cogeneration facility and at the end of a five-year lease term Alcon would have the option to purchase the equipment.[15]

Citing section 210 of PURPA, Alcon claimed that it should be considered the owner of the cogeneration equipment and argued that both the power producing equipment

---

[13] 848 F.2d at 247.

[14] *Id.* at 248.

[15] 32 FERC at pp. 61,576-77.

and the power consuming equipment composed the QF.[16] After initially rejecting Alcon's arguments,[17] on rehearing the Commission determined that third-party ownership arrangements should not *per se* bar qualifying cogeneration projects from receiving back-up power.[18] The Commission also concluded that the right to back-up power covered both the producing and consuming functions, irrespective of whether they had the same ownership. The Commission noted that, under the facts presented in *Alcon*, the ownership and operation of the equipment by O'Brien was arranged solely for financial reasons. In short, the Commission concluded that Alcon was entitled to back-up power.[19] Subsequently, PREPA sought rehearing, which the Commission denied.[20]

In affirming the Commission's decision on appeal, the District of Columbia Circuit held that Alcon's plant and O'Brien's cogeneration equipment were so closely related that they constituted a single qualifying cogeneration facility entitled to back-up power. The court discussed the following factors in evaluating whether a "close nexus" existed: (1) separate ownership of producing and consuming components could be financially advantageous; (2) O'Brien's power producing cogeneration equipment would be built on Alcon's project adjacent to the power consuming pharmaceutical plant; (3) the QF would supply only Alcon's plant; (4) the QF would generate both electricity and useful thermal energy; and (5) Alcon was given the option of purchasing the generating equipment from O'Brien. Thus, stated the court, this project was precisely

---

[16] *Id.* at 61,577.

[17] Alcon (Puerto Rico), Inc., 32 FERC ¶ 61,247 (1985) ("Alcon I").

[18] Alcon (Puerto Rico), Inc., 38 FERC ¶ 61,041 (1987) ("Alcon II").

[19] 38 FERC at p. 62,120.

[20] Alcon (Puerto Rico), Inc., 38 FERC ¶ 61,301 (1987) ("Alcon III").

the type of integrated operation that Congress intended to encourage.[21]

The court also noted that once the Commission found that Alcon's pharmaceutical plant was a component part of a QF, it necessarily found Alcon to be one of the owners of the QF. As such, Alcon was a qualifying cogenerator, *i.e.*, the owner or operator of a qualifying cogeneration facility,[22] and, under PURPA, a utility is required to offer it power for sale at nondiscriminatory rates.[23]

Shortly after the Commission's decision in *Alcon*, in 1987 Union Carbide and Fina Oil and Chemical Company (Fina) filed an application requesting Commission certification of a jointly owned cogeneration facility as a QF under PURPA. The applicants stated that Union Carbide and Fina would be partners and owners in a mutual cogeneration project in accordance with their joint venture agreement. This joint venture would be known as Fin-Lin. Fin-Lin would construct the facility, and for financing reasons, might sell it to a third party who would then lease it back to Fin-Lin. The application also stated that Fin-Lin would oversee the facility's management, but Union Carbide and Fina would actually operate the facility on behalf of Fin-Lin. The application further stated that the facility would be located on Fina's property and would provide Fina with both electrical power and steam, and would also transmit electrical power to the Union Carbide plant, which was located 1.7 miles from the production facility. This power would be transmitted to Union Carbide through a 1.7 mile, 69 kV line. Union Carbide and Fina would together consume up to 85 MW of the power produced and any excess power would be sold to a public utility.[24]

---

[21] 848 F.2d at 248.

[22] 16 U.S.C. § 796(18)(C) (1982).

[23] 848 F.2d at 249.

[24] *See* Union Carbide Corp., 40 FERC ¶ 61,337 at pp. 62,028-29 (1987).

This case thus presented the Commission with a different factual situation in that more than one entity would own the production equipment, two entities rather than one would consume electric energy produced by the equipment, and one of the consuming entities was not located immediately adjacent to the plant. The Commission nevertheless found this within the parameters of *Alcon*.

With regard to Union Carbide's and Fina's possible third-party transfer of ownership arrangement, the Commission concluded that *Alcon* controlled. The Commission stated that, even under a lease arrangement, Fina would operate the facility, Fin-Lin would manage and maintain the facility on behalf of either the partnership or a third-party owner, and both Union Carbide and Fina would consume the power from the facility under any ownership arrangement. Consequently, the Commission found that "Fin-Lin was entitled to QF status, even if a third party subsequently were to own the facility for financing reasons."[25]

In response to Gulf States' request for rehearing of the Commission order granting QF status to the Fin-Lin facility, the Commission stated that both Union Carbide and Fina, the consuming entities, were entitled to back-up power. The Commission refused "to draw an artificial distinction between the consumption and production of cogeneration energy where the two are a unitary and reciprocal process, and are formally given separate corporate status only for financial and tax purposes."[26]

On appeal, the United States Court of Appeals for the District of Columbia Circuit noted that both the Commission and Gulf States relied on the "close nexus" standard

---

[25] 40 FERC at p. 62,030. Moreover, the Commission stated that transfers of power among the owners or lessees did not disqualify the facility from receiving QF status. *Id.*

[26] Union Carbide Corp., 41 FERC ¶ 61,348 at p. 61,934 (1987).

in *Alcon* to justify their positions.[27] However, the court said that the "close nexus" standard applied specifically to the facts in *Alcon* and should not be used as a "checklist" for determining whether other arrangements would qualify for certification as QFs. The court noted that the Commission had the responsibility to establish criteria for determining whether a particular factual setting would qualify a cogeneration project for certification.[28] However, it found that the Commission had not provided an adequate explanation for its determination that the Union Carbide plant was "so integral a part of the Fin-Lin facility as to entitle it to back-up power from Gulf States."[29]

Consequently, the court granted Gulf States petition for review, and remanded the case to the Commission for further consideration. The court urged the Commission to "discuss the criteria it will be applying with sufficient specificity to provide guidance for the future."[30]

Subsequently, on June 28, 1989, Union Carbide and Fina filed a motion to expedite the Commission's order on remand, and for ashortened response time. On July 5, 1989, Gulf States filed an answer in opposition.

Discussion

We believe that in the instant case there has been a showing that the producing and the two consuming components constitute an integrated cogeneration facility, even though one of the consuming components neither uses steam generated from the facility nor is located directly

---

[27] Before the petition was scheduled to be heard, the Commission moved for summary affirmance relying on the Commission's decision in *Alcon*. *See* 872 F.2d at 489.

[28] 872 F.2d at 490.

[29] *Id.*

[30] *Id.* at 491.

adjacent to it.[31] In reaching this conclusion, we have considered, among others, the factors identified by the court in *Alcon*, *i.e.*, ownership, geographic proximity, and functional characteristics. However, we emphasize that the factors we have considered in this instance are not intended as an inclusive list of all of the factors that may be relevant in other proceedings. Also, while we will consider each of these factors in such proceedings, it may not be necessary that each one be met depending on the factual context.

Specifically, under the facts of this case, we considered the following four factors relevant in evaluating whether Union Carbide's plant is so integral a component of the cogeneration facility such that it is entitled to back-up power:

> (1) whether the power consuming component is owned by the owner or operator of the power producing component;
>
> (2) the geographic location of the consuming component served by the power producing component;
>
> (3) functional characteristics; for example, whether the power line used to transmit energy is a private line that is part of an integrated industrial operation;[32] and

---

[31] It should be noted that neither the Commission's regulations nor PURPA require that the QF itself use the steam produced by the facility in order to obtain QF status, i.e., a steam customer off-site can consume the useful thermal output of the facility.

[32] Another relevant functional characteristic would be whether the consuming component receives useful thermal energy produced by the power producing component. Although the useful thermal output component is not a factor as applied to Union Carbide, it is consistent with the court's holding in *Alcon*. The efficiency that cogeneration achieves by generating both steam and electricity is central to its attractiveness

(4) the presence of a customer/supplier relationship between the applicants.

The first factor, as the court in the *Alcon* proceeding indicated,[33] ensures that the Commission encourage QF development by providing power services to a QF's owners or operators. In the present case, Union Carbide, the owner of the power consuming facility, will be one of the owners or operators of the power producing component, Fin-Lin. We should also note in this regard that the Union Carbide facility would not lose its QF status even if Fin-Lin were subsequently sold to a third-party owner for financial reasons. As we stated in the original order in this proceeding, citing to the *Alcon* proceeding, under the facts presented here the transfer of power among the owners or lessees of a QF does not disqualify a facility from receiving QF status.[34]

As to the second factor, the Commission recognizes that neither PURPA nor the Commission's regulations require that the consuming component be physically located either on the same site as, or immediately adjacent to the site of, the power producing component. However, we believe that proximity should be a factor in deciding whether the consuming component is in fact an integral part of the facility.[35] In this case, Union Carbide's plant will be receiving its portion of the electric power output via a private line directly from a power producing facility located

---

as a mode of generation. Therefore, the power producing component of a qualifying cogeneration facility is typically integrated, both technically and economically, with the consuming component that also uses its useful thermal heat.

[33] 848 F.2d at 247-48.

[34] 40 FERC at p. 62,030.

[35] We recognize that, as a practical matter, there are limitations on the distance over which the energy can be transmitted and that these limitations will be considered in our analysis.

in close proximity (1.7 miles away) to Union Carbide's plant.

As to the third factor, we believe that the integral nature of the power producing and power consuming components can be shown where, as here, the parties transmit power through a short-distance private line from one part of an integrated industrial operation to another. In many QF cases, the consuming component served by a cogeneration facility will be physically removed from the generator itself—located in a separate building or even a separate portion of an industrial complex. In such cases, internal building wiring or other short-distance private lines will carry the electrical output from the producing component directly to the consuming component, and the existence of such wiring or lines does not imply that an otherwise integrated facility is not integrated. In this case, the 1.7-mile, 69 kV line provides the identical electrical function as internal building wiring or other short-distance distribution lines, *i.e.*, the direct connection of Union Carbide's generation with Union Carbide's electrical consuming load. Such a compact, local line performs the same electrical function regardless of the actual voltage of the line or of the length of the line.[36]

Moreover, the line will connect to Fina's side of the busbar, so that Gulf States will be providing back-up power only at one interconnection point, at the Fin-Lin site.[37] Therefore, this is not a situation where, for example, the power producing component and the power consuming component are connected to Gulf States' transmission or

---

[36] In this case the line extends 7800 feet along a railroad right-of-way, an additional 200 feet into Union Carbide's property and an additional 1000 feet into Fina's property. *See* Response of Union Carbide and Fina to Staff Request for Supplementary Information at 3 (filed Aug. 7, 1987).

[37] *See* Brief of Intervenor Union Carbide Corp. in Support of Respondent at 4 (filed Sept. 20, 1988).

distribution systems at separate multiple locations, which would affect the utility's system. Rather, this is a situation where the private line directly integrates the generation with its load and will provide essentially the same electrical impact on Gulf States as if the Union Carbide load was "located cheek to jowl"[38] to the Fin-Lin facility.

As to the fourth factor, we believe that the integral nature of the power producing and power consuming components can further be shown where, as here, there is a long-standing customer- supplier relationship between Union Carbide and Fina. Nitrogen is a critical raw material in Fina's process, and Union Carbide is Fina's major nitrogen supplier. Electricity, in turn, is a critical input to Union Carbide's manufacture of nitrogen. Moreover, this customer-supplier relationship between Union Carbide and Fina has existed for over five years. Furthermore,just as the electricity will be distributed to Union Carbide over a 1.7-mile-long power line, the nitrogen is presently piped to Fina via an approximately 1.7-mile-long pipeline.[39]

In sum, we believe that the commonality of ownership or operation of the consuming and producing components, the close proximity of the consuming and producing components, the integrated nature of the operation, and the reciprocal business relationship, as discussed above, taken as a whole, provide a sufficient basis for concluding that the Union Carbide plant is so integral a part of the Fin-Lin facility that Union Carbide's consuming component is entitled to back-up power from Gulf States. However, as we explained above, we believe the factors applied here are a non-inclusive list of the factors which may be ap-

---

[38] 872 F.2d at 490.

[39] *See* Union Carbide's and Fina's motion to expedite the Commission's order on remand at 14-15 (filed June 28, 1989). Although required by Rule 213 of our Rules of Practice and Procedure, 18 C.F.R. § 385.213 (1988), to respond within 15 days unless otherwise ordered, Gulf States did not contest these facts.

propriate to weigh, on a case-by-case basis, in determining QF status.

The Commission orders:

The application for certification of qualifying status of Union Carbide and Fina's facility is hereby granted, provided the facility operates in the manner described in the application.[40]

By the Commission. Commissioner Stalon concurred with a separate statement to be issued later.

(S E A L)

/s/ Lois D. Cashell
Lois D. Cashell,
Secretary

---

[40] Certification as a qualifying facility serves only to establish eligibility for benefits provided by the Public Utility Regulatory Policies Act of 1978, as implemented by the Commissions's regulations, 18 C.F.R. Part 292. It does not relieve a facility of any other requirements of local, state and federal law, including those regarding siting, construction, operation, licensing and pollution abatement. Certification does not establish any property rights, resolve competing claims for a site, or authorize construction.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. QF87-274-003

Union Carbide Corporation

(Issued November 9, 1989)

STALON, Commissioner, *concurring*:

The Commission's rehearing order in *Alcon*,[1] subsequently affirmed by the U.S. Court of Appeals,[2] made clear that is the entity which consumes the power produced by the QF, not just the power-producing QF itself, which is entitled to "backup" power under sub-sections 210(a) and (c) of PURPA.[3] The key issue that has apparently troubled the court in the case before us, and I believe will continue to trouble the Commission, is whether the Commission, through its QF certification process, should attempt to place any limits on *which* consuming entities should be so entitled. I believe any effort to do so will be troublesome to administer and, far more important, will cut across what is essentially the prerogative of state governments and agencies to determine which retail sales and "self-service" transactions[4] should be permitted as a matter of state policy.

---

[1] Alcon (Puerto Rico), Inc., 38 FERC ¶ 61,041 (1987).

[2] Puerto Rico Electric Power Authority v. FERC, 848 F.2d 243 (D.C. Cir. 1988).

[3] 16 U.S.C. ¶ 824a-3(a),(c)(1982).

[4] QF power wheeled to other consuming entities with common ownership with the QF.

In my dissent to the original, misguided *Alcon*[5] order (which had denied backup power to an adjacent consuming entity, Alcon, under different ownership), I pointed out how close a nexus existed between the QF and Alcon in an effort to persuade the majority of the error of their decision. However, when the Commission on rehearing agreed with me and reversed the original order, I though we had managed to avoid any notion that the showing of a sufficiently close nexus between the QF and consuming entity was prerequisite to the latter obtaining the right to receive backup power under section 210 of PURPA. Either I was incorrect or the Commission has departed from the position and slipped back into endorsing a "close nexus" prerequisite for the right to backup power. That has engaged the Commission in evaluating the relationship between the QF and consuming entity in the light of a variety of fact-specific criteria, such as the "integral nature" of the two entities and the presence of a prior supplier/customer relationship.

While the "close nexus" test has a superficial intuitive appeal, one which I fear has influenced both the review courts in their so readily embracing it, I do not believe it is a proper basis for determining when the consuming entity receiving power from a QF should be entitled to backup power under section 210.

First, and most important, any effort to apply this test consistently on a national basis will cut across an important area of state regulation and, inevitably, produce potential conflicts with it. Many states have developed quite specific rules as to when they will permit retail sales and "self-service" arrangements by QFs and when they will not. Any effort by this Commission to impose standards in its QF certification process on which consuming entities may receive backup power from a QF comes very close

---

[5] 26 FERC ¶ 61,177 (1984).

to policing the same QF retail sales issue that is so much the concern of the states, for the simple reason that few consuming entities will proceed with a power supply arrangement that relies solely on the QF's power without any assurance of backup from the utility. Hence, by policing a "close nexus" test for backup power, the Commission will inevitably be making decisions as to which "self-service" or retail sales QFs can make. At this is a state matter, the potential for infringement, overlap and conflict is obvious. Indeed, carried to its extreme, such an exercise may have the effect of imposing uniformity on state regulation in this matter, something that flies in the face of the Commission's general policy to date of leaving considerable discretion to state PUCs in implementing section 210.

More serious, it would seem to fly in the face of the basic division of regulatory authority set forth in the Federal Power Act, a conclusion apparently recognized by Congress in enacting PURPA. The Conference Report to section 210 states:

> The Conferees do not intend that this limitation on the Commission's authority will limit the States from allowing such sales [for purposes other than resale] to take place. The cogenerator or small power producer may be permitted to make retail sales pursuant to State law.

In *PRI Energy Systems, Inc.*,[6] the Commission refused to interpret the language of section 210 as prohibiting retail sales (and, as argued in that case, therefore to deny QF certification to an entity planning such sales). Rather, relying on this passage, the Commission concluded that Congress did not intend to prohibit retail sales by QFs but "intended that the question of whether [QFs] may be permitted to make retail sales *must be resolved in state*

---

[6] 26 FERC ¶ 61,177 (1984).

forums as a matter of state law." (Emphasis added.)[7] The intent of Congress appears clear, then, that the issue of what retail/"self-service" sales QFs should be permitted to make is a state not a federal matter. It is not clear to me how the Commission will be able to apply a "close nexus" test for backup in the certification context without interfering with what appears to be recognized by Congress as an exclusive state authority to police an area that is clearly very much a state concern. Nor is there any evidence that the states need our help in policing this matter—certainly not in the indirect, untargeted and possibly preemptive[8] "help" the "close nexus" test will produce.

This then, is the nub of my concern—that the "close nexus" test may be the Commission, unwittingly perhaps, into the middle of an area that is of central regulatory concern to the states and in which the Commission should not have (and probably would not want) a role.

My second concern can be briefly stated. It is already apparent, after only two cases, that the Commission is being drawn into making increasingly fine, difficult and artificial distinctions, that bear no resemblance to economic reality, in order to try to meet the evolving criteria under the "close nexus" text. That is a problem that has plagued us in several major areas of the QF certification program and should be avoided where possible. Here it clearly can and should be avoided, for the reasons stated above. Indeed, I suspect that the more the Commission tries to show sensitivity to state prerogatives in this area, the more complex this task of drawing fine distinctions will become.

---

[7] *Id.* at 61,434.

[8] While not strictly "preemption," application of the test might preclude regulation options otherwise available to state agencies.

In short, I am concerned that the Commission will be drawn into a complex, and potentially controversial, administrative quagmire in attempting to apply this test.

I am concurring and not dissenting in this case because, if the "close nexus" test is to govern, this decision was a proper one in the context of that test; and the rehearing order makes that case well. However I would urge the Commission, perhaps in the next case in this area, to reconsider the wisdom of the "close nexus" test and, perhaps, to educate the reviewing courts as to its potential dangers.

/s/ Charles G. Stalon
Charles G. Stalon
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. QF87-274-004

Union Carbide Corporation

(Issued November 17, 1989)

Before Commissioners: Martha O. Hesse, Chairman; Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

ORDER DENYING REHEARING

On August 28, 1989, Gulf States Utilities Company (Gulf States) filed a request for rehearing of the Commission's order on remand issued in this proceeding on July 28, 1989.[1]

Background

In 1987 Union Carbide Corporation (Union Carbide) and Fina Oil and Chemical Company (Fina) filed an application requesting Commission certification of a jointly owned cogeneration facility, Fin-Lin, as a qualifying facility (QF) under the Public Utility Regulatory Policies Act of 1978 (PURPA). The Commission granted the application,[2] and, on rehearing, explained that both Union Carbide and Fina,

---

[1] Union Carbide Corp., 48 FERC ¶ 61,130 (1989).

[2] Union Carbide Corp., 40 FERC ¶ 61,337 at 62,030 (1987).

as the consuming components, were entitled to back-up power.[3]

Subsequently, on April 14, 1989, the United States Court of Appeals for the District of Columbia Circuit remanded to the Commission its determination that the Union Carbide plant is part of a QF under PURPA, and therefore entitled to back-up power from Gulf States.[4] The court stated that the Commission had failed to adequately explain why Union Carbide is an integral part of the QF and so is entitled to back-up power from Gulf States.[5] The court also urged the Commission to discuss the specific criteria it will apply to identify QFs entitled to back-up services under PURPA, to provide guidance for the future.[6]

On June 28, 1989, Union Carbide and Fina filed a motion to expedite the Commission's order on remand, and for a shortened response time. Gulf States filed an answer in opposition on July 5, 1989, and requested that the Commission allow the parties to again brief the issues raised in this proceeding concerning entitlement to back-up power. On July 28, 1989, the Commission issued its order on remand.

To satisfy the court's mandate, in order on remand, we discussed four factors we considered relevant in this instance in determining whether Union Carbide's plant is so integral a component of the Fin-Lin cogeneration facility such that it is entitled to back-up power. The Commission stated that, under the combination of acts presented here, (1) the commonality of ownership or operation of the consuming and producing components; (2) the close geographic proximity of the consuming and producing components;

---

[3] Union Carbide Corp., 41 FERC ¶ 61,348 at 61,934 (1987).

[4] Gulf States Utilities Co. v. FERC, 872 F.2d 487 (D.C. Cir. 1989).

[5] *Id.* at 490.

[6] *Id.* at 491.

(3) functional characteristics that would indicate the integral nature of the consuming and producing components; and (4) the presence of a customer-supplier relationship between the parties, provided a sufficient basis for concluding that the Union Carbide plant is an integral part of the QF and is entitled to back-up power. The Commission stated, however, that these four factors were a non-inclusive list of the factors that may be appropriate to weigh, on case-by-case basis, in determining QF status.[7]

Discussion

In its request for rehearing Gulf States argues that the Commission erred by: (1) disregarding Gulf States' request for an orderly schedule that would give sufficient time for consideration of the issues raised in Union Carbide's motion to expedite; (2) in effect granting the motion to expedite by relying in part on assertions first raised in that motion without affording Gulf States the opportunity to reply to those assertions; (3 not presenting criteria sufficient to determine whether a particular factual setting would qualify a consumer of cogenerated electric power as a consuming component of the cogeneration facility; and (4) holding that the Union Carbide plant is an integral part of a cogeneration facility, and, as such, is entitled to back-up power as a consuming component of that facility.[8]

At the outset we will dispose of Gulf States' two procedural arguments, (1) and (2) above. Contrary to Gulf States' assertions, the Commission's Rules of Practice and Procedure do not provide for the submission of briefs after a court has remanded a case to the Commission for further review. They likewise do not provide for the submission of briefs in response to a motion. Instead, Rule 213 of the Commission's Rules of Practice and Procedure allows the filing of an answer in response to a motion, and Rule

---

[7] 48 FERC at 61,507.

[8] Request for Rehearing at 2.

213 further provides that an answer must be filed within 15 days after the motion is filed unless otherwise ordered.[9] In this case, Union Carbide filed a motion for expedition and a request to shorten the response time to that motion from 15 days to 7 days. The Commission did not shorten the response time, and Gulf States had the full period of time to respond as provided in the regulations. Gulf States filed an answer, and could have responded on the merits to Union Carbide's motion; Gulf States chose not to do so, however.

The parties to this case have had full opportunity to submit their arguments and evidence to the Commission. The issues in the case were thoroughly briefed both before the Commission and the court. Although the Commission has discretion to seek further briefing after a court remand, there was no need to do so based on the record before the Commission.[10] Gulf States has had sufficient opportunity to respond to Union Carbide's motion, as well as to present arguments on rehearing.[11] Gulf States is not entitled to yet further opportunities to make its case.

Moreover, only of the four non-exclusive factors relied upon in the order—the customer-supplier relationship—was newly presented since the close of the record. The existence of a customer-supplier relationship between Union

---

[9] 18 C.F.R. § 385.213 (1988).

[10] In addition, we note that the court's decision was issued on April 14, 1989, that Union Carbide itself did not file its motion until June 28, 1989, and that the Commission's order on remand was not issued until July 28, 1989. If Gulf States believed that there was something the Commission needed to know to decide this proceeding, Gulf States had at least the latter part of April, all of May and all of June to come forward itself. Gulf States did not, however.

[11] Boston Edison Co. v. FERC Nos. 88-1755, *et al.*, slip op. at 10, 14 (D.C. Cir. Sept. 14, 1989) (Commission accorded a party an adequateopportunity to present its arguments to the Commission when the Commission entertained request for rehearing).

Carbide and Fina was noted in Union Carbide's motion for expedition, and Gulf States did not contest its factual correctness either in its response to the motion or in its request for rehearing. Rather, Gulf States merely disputes its relevance.[12] Gulf States has not presented any compelling reason for us to order that the parties brief a matter whose factual accuracy is uncontested.

Gulf States also argues that we in effect granted Union Carbide's motion to expedite. In fact, the timing of the Commission's order on remand was not influenced by the motion to expedite. Moreover, the argument is irrelevant insofar as our substantive determination of the issues.

Gulf States' third argument above is that the four factors identified by the Commission as relevant in this proceeding fail to provide significant guidance for those seeking a distinction between QFs entitled to back-up power and uncertifiable electric power cooperatives or utility networks that are not entitled to back-up power.[13] In other words, Gulf States argues that the four factors do not individually distinguish between entities that are QFs and are entitled to back-up power, and entities that are not legitimate QFs but are really networks of unrelated customers which under the guise of QF status will obtain back-up power to replace their requirements power.[14] Gulf States claims that the four criteria will permit not only the former but also the latter.

We disagree with Gulf States' arguments. The Commission's order on remand provided a flexible list of nonexclusive factors to consider in determining whether a facility is entitled to back-up power. We emphasize that in this particular case no one factor was determinative in reaching our conclusion; rather, we considered the factors

---

[12] Request for Rehearing at 12-15.

[13] *Id.* at 7.

[14] *Id.* at 6-15.

together as a whole.[15] Those seeking QF status must sufficiently demonstrate the integral nature of their operations before we grant certification, which will ensure that only those entities that are legitimately entitled to QF status will be granted QF status. The factors identified in our order on remand taken together provide such a demonstration. At this juncture, we believe the four factors listed provided a solid starting point for our analyses and sufficient guidance for the future. Moreover, the Commission has no intention of certifying facilities that do not meet the letter and the spirit of PURPA.

Gulf States' fourth argument is that the Commission erred in holding that the Union Carbide plant is an integral part of the certified cogeneration facility, and, as such, is entitled to back-up power as a consuming component of that facility.[16] As we discussed above, we considered four factors relevant in evaluating whether the Union Carbide plant is an integral component of a QF and so is entitled to back-up power. On rehearing, Gulf States attempts to isolate each factor and argue that the individual factor does not support a finding that the Union Carbide plant is part of the QF. However, as we noted above, our analysis examines all of the factors together, and not individually. As we stated in our order on remand, the four factors when taken as a whole "provide a sufficient basis for concluding that the Union Carbide plant is so integral a part of the Fin-Lin facility that Union Carbide's consuming component is entitled to back-up power from Gulf States."[17]

We believe it appropriate to provide additional, clarifying discussion of the second factor identified in our order. The second factor is the geographic location of the

---

[15] 48 FERC at 61,507.

[16] Request for Rehearing at 1-2.

[17] 748 FERC at 61,507.

consuming component served by the power producing component. Gulf States argues that our discussion of this factor suggests that the geographic location of the consuming component may extend to distances far beyond the 1.7 miles separating the Union Carbide plant from the Fin-Lin generating facility. Gulf States cites to cases where the Commission found that transmission lines of varying lengths—all of which exceeded 1.7 miles—were part of a QF.

The second factor recognizes that, while the law does not require that the consuming component be located on the same site as or even adjacent to the power producing component, the proximity of the consuming component to the producing component can be an important factor in deciding whether the consuming component is an integral part of the QF. Indeed, even Gulf States recognizes the appropriateness of this factor. We agree with Gulf States that the Commission's second factor acknowledges that Congress could not have intended that we grant QF status to any off-site consumer, regardless of its location.[18] However, the factor purposely does not draw any specific line as to how far a consuming component may be located in relation to the power producing component. This is because the Commission does not believe it can reasonably draw an arbitrary cut-off point. Furthermore, as we stated above, the Commission will consider the specifics of each particular case, along with the other factors, in making its determination. Insofar as the cases cited by Gulf States are concerned, those cases involve transmission lines whose function was to transmit power in bulk from the QF to the purchasing utility.[19] Those cases address a different

---

[18] *See* Request for Rehearing at 20.

[19] *See* Midway-Sunset Cogeneration Co., 47 FERC ¶ 61,273 at 61,954 (1989); Coso Energy Developers, 45 FERC ¶ 61,003 at 61,005 n.3 (1988); Gamma Mariah, Inc., 44 FERC ¶ 61,442 at 62,397, 62,399 (1988); Oxbow Geothermal Corp., 43 FERC ¶ 61,286 at 61,782-83 (1988).

question—whether the bulk power transmission lines tying the QF to the utility were part of the QF—and are irrelevant here.

Additional discussion of the third factor identified in our order is also appropriate. The third factor is functional characteristics (in this case, whether the power line used to transmit energy is a private line that ties the consuming and producing components together). Gulf States argues that our discussion of this factor is so vague that it does not provide any guidance.[20] We disagree. As we found in our order on remand, the parties distribute power through a short-distance private line from the producing to the consuming component, *i.e.*, through a short-distance private line electrically equivalent to short-distance distribution lines or internal building wiring.[21] The private line serves only a distribution function, rather than a bulk power transmission function, since the private line integrates loads on the consumption side as opposed to integrating power supply resources on the supply side.[22]

In addition, since Gulf States argues that the functional characteristics factor is unclear, we will provide another example. In the *Alcon*[23] case the court identified such a factor, *i.e.*, that the consuming component receives useful thermal energy produced by the power producing component. The efficiency that cogeneration achieves by generating both steam and electricity is central to its attractiveness as a mode of generation. Therefore, either the electrical or thermal power producing components of

---

[20] Requests for Rehearing at 11-12.

[21] 48 FERC at 61,506.

[22] *Id.* at 61,506-07.

[23] 32 FERC ¶ 61,247 (1985), *reh'g granted in part and denied in part*, 38 FERC ¶ 61,042, *reh'g denied*, 38 FERC ¶ 61,301 (1987), *aff'd sub nom.* Puerto Rico Electric Power Authority v. FERC, 848 F.2d 243 (D.C. Cir. 1988).

a qualifying cogeneration facility may be integrated, both technically and economically, with the consuming components of another entity. The *Alcon* case involved the integration of the consuming component that also used the useful thermal heat produced by the cogeneration facility; whereas the instant case involves the integration of Union Carbide's consuming component that uses the electricity produced by the jointly owned cogeneration facility.

The Commission orders:

Gulf States' petition for rehearing is hereby denied.

By the Commission. Commissioner Trabandt concurred with a separate statement to be issued later.

(S E A L)

/s/ Lois D. Cahsell
Lois D. Cashell,
Secretary

Union Carbide Corporation

Docket No. QF87-274-004

(Issued February 16, 1990)

TRABANDT, Commissioner, *concurring*:

This proceeding attempts to answer the question: how will the Commission determine what physical arrangements constitute a single "facility" that we may certify as eligible for benefits under the Public Utility Regulatory Policies Act (PURPA)? We also grant, for the second time, PURPA qualifying facility (QF) certification to the Union Carbide Corporation (Union Carbide) proposal. I agree with the four-part test the Commission used to reach its result, *Union Carbide Corporation*, 48 FERC ¶ 61,130 (1989), and in the recertification.

I write on rehearing to explain how these factors form a coherent basis for deciding the issue. In this way, I can address the concerns the United States Court of Appeals for the District of Columbia Circuit expressed when it remanded the previous certification, *Gulf States Utilities Co. v. FERC*, 872 F.2d 487, 490-491 (D.C. Cir. 1989) and offer my response to the criticisms of the Commission's rationale in Commissioner Stalon's concurring opinion on remand, *Union Carbide Corporation*, 49 FERC ¶ 61,178 (1989).

1. The Big Picture

The court pointed out in *Gulf States Utilities*, 872 F.2d at 488-489, Congress enacted PURPA to wean the country away from dependence on oil. Part of that effort entailed

encouraging cogeneration. Industries that produced steam in their operations would not let it go to waste, but turn it into electricity. In order to ensure the proper incentives existed, PURPA and the Commission's regulations guarantee a market for QF power at higher than traditional rates. In addition, and more relevant here, the utility that must purchase the QF's electricity must also provide "standby" (supplemental; maintenance (for scheduled shutdown); and "back-up" (for unscheduled outages)) power to the "facility" to fulfill its energy needs.

Situations in which an owner attaches cogeneration equipment to a factory represent straightforward applications of that requirement. The utility simply transmits the standby power to the cogenerator. More complicated facts beget harder cases. The *Alcon* case (*Alcon (Puerto Rico), Inc.*, 32 FERC ¶ 61,247 (1985), *rev. on reh.* 38 FERC ¶ 61,042, *reh. den.* 38 FERC ¶ 61,301 (1987), *aff'd sub nom. Puerto Rico Electric Power Authority v. FERC (PREPA)*, 848 F.2d 243 (D.C. Cir. 1988)) and this one represents two examples.

In simple terms, *Alcon* involved a plant and cogeneration equipment with separate ownership; the utility had to supply back-up power to both. Union Carbide asks us to certify as one PURPA "facility": (1) an oil refinery belonging to another company; (2) a Union Carbide plant; and (3) a jointly-owned cogeneration plant, connected to the refinery and the Carbide plant, that supplies electricity to both but steam to only one. Over its objection, the utility would have to provide back-up power to all three parts of the QF.

The Commission's orders in *Alcon* and this case speak generally in terms of defining "components" of the qualifying "facility." While that characterization applied to *Alcon*, where the design basically involved attaching cogeneration equipment to an existing building, it does not fully describe this case. In reality, the utility here must

provide electricity to three different places: the cogeneration unit, the refinery and the Carbide plant. Outside the QF context, the refinery and the Carbide plant would separately purchase electricity as retail customers.

If the particular plant uses the QF's stem as well, one could better argue that the cogeneration program envisions the utility supplying back-up power to each of the different plants. However, since one of the plants consumes only electricity, we must tread more carefully. QF certification may provide a PURPA cover (and federal coercion) for either retail sales between the QF and the plant (in which the state would normally have a say), or overriding state franchise laws (if a distant utility must provide the standby power), or both.

This real possibility for abuse makes this the "harder" case. Retail customers may decide to connect their plants, place a cogeneration plant somewhere along the way and obtain federal certification as a "facility,' without all of them having to use steam. Therefore, rather than furthering the goal of cogeneration, certification could provide a means for circumventing state regulation. As I stated in my concurring opinion in *Alcon*, 38 FERC at p. 61,124:

> [Unless the Commission draws precise lines, it] in all likelihood would be sanctioning directly the use of . . . QF generation to make unrelated retail sales to other customers of the utility, with serious negative impact on the utility and its ratepayers. The Commission also would be sanctioning potentially the shift of the obligation to provide back-up power from one utility to another depending on the respective location of the various consuming loads and facilities to be served. That result could effectively alter current state service territories or customer assignments of utilities . . . . Such effects . . . would interfere

> with the heretofore traditional prerogatives of the states under . . . PURPA . . . .

On the other hand, to limit our QF certification to cases of one facility and one owner would substitute parsimony for the generosity Congress called for when it enacted the cogeneration program. As the court held in affirming our *Alcon* decision:

> PREPA argues that . . . "only the particular machinery used in the production of power" may be certified as a QF entitled to back-up power . . . . We cannot agree. [PURPA] certainly does not explicitly state that a qualifying facility cannot encompass *both* the production equipment and a closely related consuming entity, or that all parts of a facility must be owned by a single entity. Indeed, the statutory language contains a hint that points in the opposite direction; part of the definition [of cogeneration facility] is that the electric power and other useful energy are to be "*used* for industrial, commercial, heating or cooling purposes." . . . PREPA essentially invites us to read the sole functional *requirement* for a "cogeneration facility" to state the facility's sole *permissible* function. Thus we cannot accept PREPA's argument . . . .

PREPA, 848 F.2d at 247 (Emphasis in original; citations omitted).

How, then, should we define "closely related," without descending to eh " 'know-it-when-we-see-it' approach" the courts rightly condemn (*see, City of Vernon v. FERC*, 845 F.2d 1042, 1048 (D.C. Cir. 1988))? As I now explain, the Commission formulated, first, the "close nexus" test, and, now, the four factors to do just that.

2. Connecting the Dots

PREPA affirmed *Alcon* because the court found that the cogeneration equipment lay adjacent to the plant, it

served the plant exclusively (with both steam and electricity) and the separate ownership had significance for tax purposes only. Accordingly, the District of Columbia Circuit held that "[g]iven the 'close nexus,' it was altogether reasonable for the Commission to view the QF concept as encompassing both . . . components of the project." 848 F.2d at 248. When this case came before that court, the parties argued over how to apply the "close nexus" test of *Alcon* to the Union Carbide facts.

According to the court's *Gulf States Utilities* opinion, 872 F.2d at 490, the dispute evidently turned on whether the joint ownership here (more favorable to QF status than the separate owners in *Alcon*) outweighed the geographic separation here (worse for certification than the juxtaposition in *Alcon*). The court concluded, *id.*:

> Both parties treat the passage from which the phrase "close nexus" is taken with excessive reverence. That passage . . . should not be regarded as a checklist for determining whether other arrangements [besides Alcon's] will qualify for certification as QFs. It is not for us to establish authoritative criteria for determining whether a particular set of facts will qualify a cogeneration project for certification. That responsibility rests with the Commission.

The court, in effect, told the Commission it must use more sophisticated tests than ownership and geography. The panel also noted, *id.*, that the Commission failed to come to grips with another difference between this case and *Alcon*. Specifically, in *Alcon*, the cogeneration equipment supplied steam and electricity to the plant and the Commission properly found that both facilities formed part of a whole. Here, however, the Union Carbide plant will take only electricity. Yet the Commission also held the plant qualified as part of a unit and did not constitute a

separate retail sale over which the state exercised jurisdiction.

The court "express[ed] no opinion on the matter but merely point[ed] out that it is not enough, in support of a conclusion, to cite another conclusion." 872 F.2d at 491. The orders on remand, in my view, contain enough detail to satisfy the court's directions. From the other end of the spectrum, Commissioner Stalon's concurring opinion argues that we have on remand gone too far. it states that our embrace of "close nexus" represents federal overreaching, 49 FERC at pp. 61,687 ("close nexus" test "will cut across what is essentially the prerogative of state governments"), 61,688 (applying "close nexus" will "interfer[e] with what appears to be recognized by Congress as an exclusive state authority to police an area that is clearly very much a state concern"). With all due respect, I think not.

I wrote in my concurring opinion in *Alcon*, 38 FERC at p. 61,123, that the "close nexus" test allows for some expansion of the federal role because using it means that "third-party ownership arrangements [do not] *per se* preclude qualifying cogeneration projects from receiving" PURPA benefits. At the same time, the test represents a "more precise approach by which to evaluate whether a consuming entity is entitled to [PURPA certification]." Commissioner Stalon's opinion does not advocate return to the rigid refusal to certify multiple facility projects. Indeed, he calls the original *Alcon* rejection "misguided," 49 FERC at p. 61,687. Therefore, he has no objection to expanding QF certification beyond the project that encompasses an owner attaching equipment to a factory.

I take it, then, that he urges the Commission certify projects that would fail the "close nexus" test. To me, rather than accommodate the states, that course of action would stifle them. The Commission would force jurisdictions refusing to allow sales from QFs to retail customers

to accept those transactions as part of the project's operation. In addition, as I noted earlier, QF status also forces utilities to sell standby power where the states would not authorize sales if the customer were not a cogeneration project. By the same token, states that wish to permit such dealings may still do so to the extent their own authority allows. Denying QF certification does not prohibit power plants from selling at retail.

In fact, as Commissioner Stalon notes, "[m]any states have developed quite specific rules as to when they will permit retail sales and . . . when they will not." 49 FERC at p. 61,687. By granting PURPA certificates to proposals, regardless of whether the parties have shown a "close nexus," we will remove from the category of retail sales power flows between the cogeneration station and the industrial or commercial plant. Similarly, QF status for the customer requires the utility to provide standby power, no matter what the state may say. Without a "close nexus" test to draw a line, the Commission, in effect, dictates to the states that they must allow retail sales from and to QFs. Whatever "specific rules" the respective public utility commissions may have adopted as to "when they will not" allow sales, the PURPA requirements governs.

I will now take up the court's concern. Perhaps I expressed it to cryptically, but I envisioned the "close nexus" test as involving more than a mechanical application of ownership and geography. As I stated in *Alcon*, 38 FERC at pp. 61,123-124:

> Accordingly, under the facts of this case, when a QF has been constructed for the express purpose of providing electrical power directly for a specific electrical load of an identified activity of a given commercial, industrial or other power-consuming facility . . . to which the QF is interconnected directly for transmission of electrical power to the specific load, the [QF and the fa-

> cility become one project]. . . . The relationship between the QF and the consuming entity must be established by appropriate documentation, such as engineering drawings [or] contractual terms or other extrinsic evidence.

If the developer could technically and contractually tie the cogeneration plant to the power-consuming facility, we would certify both as a QF project. I also noted, 38 FERC at p. 61,124, that we must find in each case that the different parts of the proposed cogeneration project in fact "comprise the production and consumption functions of the typical QF that Congress intended to receive the full benefits of [PURPA], including the right to back-up power."

Stated in 25 words or less, I intended to propose the following test: whatever form it takes, the "project" must comprise cogeneration equipment supplying power and stem to *one industrial or commercial process*. Hooking up all plants within a 50 mile radius and a cogeneration station to form an alternate grid will not pass muster. For me, this proposition forms the framework for understanding the four factors we adopted on remand and how they meet the court's requirements.

First, I will list the criteria: (1) common ownership of the cogeneration equipment and the industrial or commercial plant(s); (2) the geographic proximity of the various plants involved; (3) "functional characteristics" that show the entire project comprises an integrated operation; and (4) the existence of a customer-supplier relationship between the parties. *Union Carbide Corporation, order denying rehearing*, 49 FERC ¶ 61,61,209 at p. 61,731, citing 48 FERC at p. 61,507. Next, I will explain how they help us determine QF status.

This order correctly points out that we will not consider each factor in isolation, rather the overall picture. Nevertheless, I find each relevant to the inquiry. In particular, if the same enterprise that engages in the industrial or

commercial activity owns the cogeneration equipment at the same, or an immediately adjacent, site, we can safely assume for the most part that we have one project. However, the same owner cannot dispatch QF power to industrial or commercial activities located as dispersed sites.

Similarly, even if different companies own the various pieces, the closer geographical locations they enjoy, the more likely they operate as a unit. Perhaps the negative illustrates this point better. The farther away the plants, the more I think we may reasonably conclude that we have before us the alternate grid situation, rather than a legitimate QF. Thus, the activities must be co-located at the same site or on immediately adjacent sites with the electric generating facility.

The third criterion speaks to the project's operation. Even if an applicant presents to us a situation with two industrial plants, under two owners, on two sites, as a matter of engineering, they must still constitute parts of one wholly integrated commercial or industrial process. In effect, the applicant must prove that one constitutes an essential feature of the integrated process with the other. One way to do that entails describing how the plants operate together from an engineering and technical perspective.

The fourth factor, finding a customer-supplier relationship independent of the cogeneration effort, shows a preexisting combination which is an element or feature of the contractual relationship supporting an integrated process. That tends to prove that when the parties propose to attach a cogeneration station to their respective plants, they have designed a legitimate cogeneration effort. The parties did not concoct a "project" just to take advantage of PURPA as a way of evading state regulation.

In the next section, I summarize how these factors, applied here, lead me to agree that the Union Carbide

proposal represents a legitimate cogeneration project that we properly certify as a QF.

3. The Finished Work

The application we grant here involves the oil refiner and Union Carbide jointly owning a cogeneration station. The station would serve both their separately owned industrial plants. One plant lies about two miles away from the station, while the other abuts it. The station would provide steam and electricity to the refinery but only electricity to the Union Carbide plant. I find the arrangement merits QF status.

I need not repeat the Commission's discussion of the ownership and geographic proximity considerations. The orders satisfactorily handle those issues. I understand the Commission's reluctance to draw a precise lien on how far apart the plants may be, 49 FERC at p. 61,733. Nevertheless, I want to emphasize that applicants must locate their cogeneration and industrial plants within a short distance of each other, if not at the same site. I also place great weight on integrated operations and pre-existing relationships. Thus, location counts as well, especially as a weight against approval. Here, I find the distance (less than two miles) marginally reasonable, although at the outer limit of acceptability.

For me, the decisive factors remain the third and fourth. The refinery directly supplies raw material to the Union Carbide plant (48 FERC at p. 61,507) and once the cogeneration station begins to operate, a system of wires will connect the three buildings. In addition, the utility will have to supply electricity to only one place, as the order on remand states, 48 FERC at pp. 61,506-61,507. Therefore, the project will, in fact, comprise one operation.

Finally, the order on remand states (48 FERC at p. 61,505) that the refinery has been directly piping to Union Carbide a raw material necessary for the plant for many

years before the two companies decided to form this QF joint venture. In effect, the refinery and the Union Carbide plant have been part of one physically and technically integrated industrial process. Attaching the cogeneration station to the refinery to serve the Union Carbide plant as well represents a traditional QF. Therefore, on these facts I conclude that here the applicant has not presented the Commission with a case of two companies in search of a PURPA machine with which to reap rewards in the electric business.

4. Conclusion

The Court of Appeals on review of the previous Union Carbide orders found they contained no guidance for the future. Indeed, the panel could discern no basis for our decision in these facts. Commissioner Stalon on remand expressed a concern, 49 FERC at p. 61,688, about the Commission "being drawn into making increasingly fine, difficult and artificial distinctions, that bear no resemblance to economic reality . . . ." To me, the orders on remand meet both concerns.

I think that "bear[ing] resemblance to economic [or engineering] reality" lies at the heart of the "close nexus" test we used in *Alcon* and have adopted in this case. As the Commission explained in the order on remand, and as I summarized in the preceding section, we certified the Union Carbide proposal because in "economic reality," as well as a matter of engineering and technical fact, the oil refinery, the Union Carbide plant and the cogeneration station fit together as a QF unit. The project this application describes represents more than the product of a QF developer's creative imagination.

Perhaps as we gain more experience with these cases, we will articulate better, or add to, the factors we considered here. Taken together, these factors provide additional explanatory and analytical precision for the Commission's concept of a "close nexus" test for multi-

party or multi-facility QF proposals. The four factors also give further definition to the *PREPA* court's notion of a "permissible function" and the *Gulf States Utilities* court's requirement for "authoritative criteria" in making a QF determination. For now, we have explained the aim of the exercise and have provided, as lucidly as I think possible, the mechanics for achieving it. I, therefore, concur.

/s/ Charles A. Trabandt

Charles A. Trabandt
Commissioner

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 27, 1988 **Decided April 14, 1989**

No. 88-1071

GULF STATES UTILITIES COMPANY,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

UNION CARBIDE CORPORATION,
INTERVENOR

Petition for Review Of Orders of the Federal Energy Regulatory Commission

---

Daniel L. Koffsky, with whom *Wm. Warfield Ross* and *Jane Seigler* were on the brief, for petitioner.

Joseph S. Davies, Attorney, FERC, with whom *Catherine C. Cook*, General Counsel and *Jerome M. Feit*, Solicitor, FERC, were on the brief, for respondent.

Philip A. Fleming was on the brief for intervenor.

Before STARR, BUCKLEY, and D.H. GINSBURG, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* BUCKLEY.

BUCKLEY, *Circuit Judge*: Cogeneration facilities are designed to meet the thermal and electrical energy needs of particular commercial and industrial consumers. Congress requires electrical utilities to provide qualifying co-

generation facilities with standby "back-up" power. Gulf States Utilities Company challenges a Federal Energy Regulatory Commission finding that a Union Carbide Corporation plant is entitled to receive back-up power even though the electricity it receives must be transmitted 1.7 miles from a cogeneration facility that Union Carbide owns jointly with another company. At issue in this case is the Commission's characterization of the Union Carbide plant as the consuming component of a qualifying cogeneration facility although it neither uses the steam generated by the facility nor is located adjacent to it. Because we conclude that the Commission failed to provide an adequate explanation of its ruling, we remand the case for further consideration.

I. BACKGROUND

A. Applicable Statute and Regulations

" 'Cogeneration' involves the joint production of electricity and useful heat or steam, in circumstances where some or all of the heat would otherwise be dissipated into the environment." *Puerto Rico Elec. Power Auth. v. FERC ("PREPA")*, 848 F.2d 243, 244 (D.C. Cir. 1988).

In response to the energy crisis of the 1970's, Congress sought to encourage the use of cogeneration as an energy conservation measure. Among the impediments to such use identified by Congress were the reluctance of electric utilities to purchase surplus electricity produced by cogeneration facilities and to provide them with a supplementary source of power. PREPA at 244-45. As a result, when Congress enacted the Public Utility Regulatory Policies Act of 1978 ("Act"), it included a provision directing the Federal Energy Regulatory Commission ("FERC") to prescribe rules under which electric utilities would be required to provide back-up power to, and purchase surplus power from, "qualifying cogeneration facilities" ("QFs"). 16 U.S.C.§ 824a-3(a) (1982).

The Act defines a "cogeneration facility" as one that produces

> (i) electrical energy, and
> (ii) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes.

Id. § 796(18)(A). A "qualifying cogeneration facility" is one that

> (i) the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe; and
> (ii) is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities).

Id. § 796(18)(B).

The Commission's regulations specify two prerequisites for certification as a QF. First, the facility must meet certain operating and efficiency standards. 18 C.F.R. § 292.205(a) and (b) (1988). Second, no more than a fifty percent interest in a facility may be owned by an electric utility, a group of electric utilities, or an electric utility holding company. *Id.* § 292.206. The regulations also require that electric utilities both purchase excess energy from QFs and provide them with back-up power. *Id.* §§ 292.303 and 292.305(b)(1).

B. The Facts

Union Carbide Corporation and Fina Oil and Chemical Company ("Fina") agreed to form a partnership, to be called "Fin-Lin," that would establish and operate a cogeneration facility at a site adjacent to the Fina plant in Port Arthur, Texas. In 1987, pursuant to procedures established by it (*see id.* § 292.207), the partners filed a joint

application with FERC asking that the proposed Fin-Lin plant be certified as a QF. The application stated that the facility would provide Fina with electrical power and steam and would transmit electrical power, but not steam, to the Union Carbide plant located 1.7 miles away in Groves, Texas. The partners stated that Fin-Lin would construct the proposed facility but, for tax and other reasons, might sell it to a third party that would then lease it back to Fin-Lin. Fin-Lin would oversee the facility's management, but Fina would run its day-to-day operations on behalf of Fin-Lin.

Over Gulf States' objection, the Commission concluded that the Fin-Lin facility, the Fina oil plant in Port Arthur, and the Union Carbide plant in Groves were all components of a QF, that transfers of power among the owners of a facility did not disqualify it from receiving QF status, and that the Fin-Lin facility was entitled to the benefits of that status. Accordingly, in September 1987, FERC issued an order granting Union Carbide's and Fina's application for certification as a QF, *Union Carbide Corp and Fina Oil and Chem. Co.*, 40 F.E.R.C. ¶ 61,337 (1987) ("Certification Order"). Subsequently, in denying Gulf States' request for rehearing, FERC asserted that "the consuming entities here are entitled to back-up power" and that it "refuse[s] to draw an artificial distinction between the consumption and production of cogeneration energy where the two are a unitary and reciprocal process, and are formally given separate corporate status only for financial and tax purposes." Order Denying Rehearing, 41 F.E.R.C. ¶ 61,348 at 61,924 (1987).

Gulf States petitioned for review of the two orders. Shortly before its petition was scheduled to be heard, FERC moved for summary affirmance on the ground that our recent decision in PREPA was dispositive of Gulf States' claim.

II. DISCUSSION

In *PREPA*, which issued after FERC's decision in this case, this court considered the propriety of the grant of QF status in a situation where, because of tax and other considerations, the plant that consumed cogenerated energy and the adjacent facility that produced it were separately owned. In that case, O'Brien Energy Products, Inc. owned and operated the cogeneration facility that supplied electricity and thermal energy to a pharmaceutical manufacturing plant owned by Alcon, Inc. O'Brien and Alcon were "separate corporations, evidently not affiliated." 848 F.2d at 245. O'Brien had leased the site of the energy producing plant from Alcon. Under the terms of the lease, O'Brien had sole responsibility for constructing, operating, and maintaining the plant. At the end of the five-year lease, Alcon had the option of renewing the lease, purchasing the facility for its residual value,or requiring O'Brien to remove the facility from the property. *Id.*

The Puerto Rico Electric Power Authority argued that its duty to provide back-up power extended only to the O'Brien-owned cogeneration facility. The Commission determined, however, that Alcon was entitled to back-up power because the back-up provision of section 210 of the Act "covers both the production and consumption functions, irrespective of whether they have the same ownership." *Alcon (Puerto Rico), Inc.*, 38 F.E.R.C. ¶ 61,042 at 61,120 (1987). In PREPA, we agreed that the divided ownership did not disqualify Alcon because its arrangement with O'Brien represented the kind of integrated operation that Congress intended to encourage:

> O'Brien's generating equipment will be built on Alcon's land directly adjacent to the pharmaceutical plant; it will supply only Alcon's plant; it will generate both electricity and useful thermal energy; and Alcon is given the option to purchase the generating equipment from O'Brien

> at the expiration of the five-year lease. Given the "close nexus," it was altogether reasonable for the Commission to view the QF concept as encompassing both the producing and the consuming components of such a project.

848 F.2d at 248.

The Commission contends that our decision in *PREPA* controls this case although it acknowledges two distinctions in the underlying facts. First, unlike the case in *PREPA*, the consumers of the energy produced by the Fin-Lin facility own and operate the plant. In its brief and at oral argument, FERC emphasized that Union Carbide's co-ownership of the cogeneration component made the case for certification all the more compelling. Second, one of the consumers, Union Carbide, is located 1.7 miles away from, rather than adjacent to, the energy producing component. FERC dismisses this fact as inconsequential: the statute does not specifically require that a QF's energy producing and consuming components be located cheek to jowl, and an insistence on such proximity would undermine the Act's objective of encouraging cogeneration.

By contrast, Gulf States finds these two differences to be decisive. It argues that Union Carbide cannot be considered an energy consuming component of the Fin-Lin project because the "close nexus" to which we refer in *PREPA*, *id.*, does not exist here: the electricity Union Carbide consumes is produced not next door, but at a site almost two miles away; furthermore, Union Carbide consumes only the electricity produced by the Fin-Lin facility, and not the thermal energy that is an essential component of cogeneration. Thus, Gulf States maintains, Union Carbide's relationship to the facility is essentially that of a retail purchaser of surplus electricity rather than that of a "consuming component" of a cogeneration project. Accordingly, Gulf States concludes it may not be required to provide Union Carbide with back-up power because the

latter lacks the "close nexus" between energy producing and consuming components on which we based our decision in *PREPA*. *Id.*

Both parties treat the passage from which the phrase "close nexus" is taken with excessive reverence. That passage, which is quoted at page 6 above, applied specifically to the facts in PREPA and should not be regarded as a checklist for determining whether other arrangements will qualify for certification as QFs. It is not for us to establish authoritative criteria for determining whether a particular set of facts will qualify a cogeneration project for certification. That responsibility rests with the Commission.

Unfortunately, in this case, we are unable to find in the Commission's orders, or in its brief, a coherent explanation for its determination that the Union Carbide plant is so integral a part of the Fin-Lin facility as to entitle it to back-up power from Gulf States. The Commission alluded, in its Certification Order, to the fact that multiple ownership of a facility poses no obstacle to certification. 40 F.E.R.C. ¶ 61,337 at 62,031. It also noted, in its Order Denying Rehearing, that it would not draw an "artificial distinction between the consumption and production of cogeneration energy where the two are a unitary and reciprocal process." 41 F.E.R.C. ¶ 61,348 at 61,934. The Commission fails to indicate, however, why it would have been artificial to distinguish the Union Carbide plant from that of its Fina partner, which is adjacent to, and a prospective consumer of both forms of energy to be produced by, the Fin-Lin facility. We express no opinion on the matter but merely point out that it is not enough, in support of a conclusion, to cite another conclusion.

III. CONCLUSION

Because the Commission has failed to explain the basis for its decision, we deny FERC's motion for summary affirmance, grant Gulf States' petition for review, and re-

mand the case to the Commission for further consideration. We urge the Commission to take the occasion to discuss the criteria it will be applying with sufficient specificity to provide guidance for the future. We do not suggest what lines might be drawn, or where. That is the Commission's responsibility.

So ordered.

Union Carbide Corporation and Fina Oil and Chemical Company

Docket No. QF87-274-000

(Issued September 28, 1987)

Order Granting Application for Certification as a Qualifying Facility, Denying Request for Hearing, Noting Intervention and Denying Motions

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C.M. Naeve.

On February 24, 1987, as amended on March 9, 1987, June 1, 1987, and August 7, 1987, Union Carbide Corporation (UC) and Fina Oil and Chemical Company (Fina) (together as Applicants) filed an application for certification as a qualifying cogeneration facility pursuant to section 292.207 of the Commission's regulations. Notice of the application was published in the *Federal Register*.[1] On June 5, 1987, the Commission issued an order extending the time for Commission action on UC/Fina's application.

The proposed topping-cycle cogeneration facility will be located on the property of Fina in Port Arthur, Texas. The primary energy source will be natural gas. The proposed facility will consist of two combustion turbine generators, two heat recovery steam generators, one backpressure steam turbine generator and one extraction/con-

---

[1] 52 Fed. Reg. 7,473 (1987).

densing steam generator. The net electric power production capacity of the facility will be 83.8 MW. UC states that it will use the electric power produced at the facility at its plant located in Groves, Texas. This electric power will be transmitted to UC via a proposed 1.7 mile 69 kV transmission line. Fina states it will use power and steam from the facility at its plant adjacent to the facility.

Together Fina and UC will use up to 85 MW of the electrical power produced by the facility. Any portion of the electrical power not used by UC or Fina will be sold to a public utility. Fina will use the steam produced by the facility in the processing unit of its plant adjacent to the facility. In their application, UC and Fina state that the facility will be owned by a third party to be named or by Fina or an affiliate thereof, and/or by UC. UC and Fina stated, however, that they will jointly operate the proposed facility. UC and Fina also state that at no time will any percentage of the facility be owned by any electric utility, electric utility holding company, or any person owned by either. As discussed below, the Applicants in their answer to a motion to intervene provided more information clarifying the future ownership, operation, and management of the facility.

The Applicants request exemption of the facility from the incremental natural gas pricing under Title II of the Natural Gas Policy Act of 1978 (NGPA) and Part 282 of the Commission's regulations. The Applicants state that such an exemption is appropriate because it meets the requirements outlined by 18 C.F.R. § 292.205(c)(1)(i) (1987).

On April 10, 1987, as amended on May 26, 1987, Gulf States Utilities Company (GSU) filed a motion to intervene, notice of protest and request for hearing in this proceeding. GSU contends that if the proposed joint venture and related transactions cause electricity generated by the cogeneration facility to be sold in a retail transaction, then the owner of the facility would become an "electric utility"

under section 3(22) of the Federal Power Act (FPA), and a "public utility" under Texas law. GSU contends that if the owner of the facility is deemed to be a utility under federal or state law, the application for qualifying status must be denied for failure to meet the Commission's ownership criteria set forth in section 292.206 of the Commission's regulations. *See* 18 C.F.R. § 292.206 (1987). GSU contends that since the energy associated with natural gas delivered by UC is greater than the electric energy received by UC, the difference in energy will be used to produce steam for Fina. GSU states that Fina's compensation to UC for providing the excess energy is a medium of exchange, thereby making the transaction a retail sale.

GSU next alleges that if the owner of the facility is a partnership to be formed by UC and Fina (to be known as Fin-Lin) and if Fin-Lin operates the facility and the electricity generated is delivered and consumed by Fina and UC, then a retail sale will occur because the owner and operator are distinct and different parties than the parties receiving the electricity. On this ground, GSU contends the application cannot be approved. GSU states that the Applicants' proposal that Fin-Lin enter into a contract for back-up power to Fin-Lin, and Fin-Lin's subsequent transfer of that power to UC and Fina would constitute a retail sale.

GSU also alleges that this application is a sham and states that if this facility is approved by the Commission, GSU will lose part of its load, causing GSU's system facilities to operate less efficiently, and thus contravening one of the objectives of PURPA. GSU also requests that the Commission set this matter for hearing. Finally, GSU submits that the application cannot be properly reviewed by the Commission until certain determinations have been made by the Pubic Utility Commission of Texas.

On May 27, 1987, the Applicants answered GSU's motion to intervene, contending that none of the allegations

made by GSU raise material issues of fact or law and therefore the request for a hearing should be denied.[2] UC and Fina also provided more information on the ownership of the facility. The Applicants state that the proposed cogeneration facility will be undertaken as a mutual cogeneration project pursuant to a joint venture arrangement between Fina and UC. Fina and UC are to be partners and owners in the joint venture which will be known as Fin-Lin. Fin-Lin will construct the proposed facility and, for legitimate financing and tax reasons, may sell it to a third party, which would then lease the facility back to Fin-Lin. Fin-Lin will manage and maintain the facility, but Fina will operate the facility on behalf of Fin-Lin. The facility will be located on Fina's property and a ground lease between Fina and any third-party owner will be executed. The Applicants further state that in light of the Commission's final decision in *Alcon* (Puerto Rico), Inc., 38 FERC ¶ 61,042 (1987) (*Alcon*), in which the Commission determined that the right to back-up power under section 210 of PURPA covers both the production and consumption functions, "irrespective of whether they have the same ownership," the method used by UC and Fina to finance the project through a sale-leaseback arrangement is immaterial to the determination that the project is a qualifying facility. Finally, Fina and UC argue that GSU's contention that if UC receives only electrical power from the facility, but no thermal energy, the result would be a

---

[2] On June 19, 1987, GSU filed a motion for leave to respond to the Applicants' answer. On June 26, 1987, the Applicants responded to this pleading. The Commission's rules prohibit an answer to an answer, unless otherwise ordered by decisional authority. *See* 18 C.F.R. § 385.213(a)(2)(1987). The Commission permitted both GSU's amendment to its original motion to intervene and the Applicants' amended response to that motion. We do not find that the consideration of the untimely June 19, 1987 and June 26, 1987 pleadings would increase our understanding of this case or that good cause has been shown to accept these filings. Accordingly, GSU's motion will be denied and the Applicants' response will be rejected.

retail sale of electricity, is without merit. The manner by which they as partners determine to take their sales of the electrical power or thermal energy is irrelevant for purposes of qualification.[3]

Discussion

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (1987), the timely, unopposed motion to intervene by GSU makes it a party to this proceeding.

Subsequent to the Applicants' request for exemption from the incremental pricing under Title II of the NGPA and Part 282 of the Commission's regulations, President Reagan, on May 21, 1987, signed enrolled bill H.R. 1941 which repealed Title II (Incremental Pricing) of the NGPA. By Order No. 478, issued on July 27, 1987, the Commission revoked its regulations under Title II of the NGPA (18 C.F.R. Part 282), effective January 1, 1988. *See FERC Statutes and Regulations* ¶ 30,757 (1987). Thus exemption from the incremental pricing under Title II of the NGPA is moot. As to Part 282 of our regulations, which is still in effect, an exemption is appropriate because this application meets the requirements outlined by 18 C.F.R. § 292.205(c)(1)(i) (1987).

The thrust of GSU's arguments is that because this case allegedly involves retail sales from a proposed qualifying facility, certification cannot be granted because section 210(a) of PURPA prohibits the Commission from authorizing a qualifying facility to make any sale for purposes other than resale. GSU misreads section 210(a) of PURPA which specifically states that the Commission ". . . may not authorize a qualifying cogeneration facility . . . to make any sale for purposes other than resale." The Commission has stated that section 210(a) does not "limit a state's

---

[3] Under the joint venture, UC's share of steam generated by the facility will be sold by UC to Fina.

authority to permit retail sales by qualifying facilities; it is rather, solely a limitation on the grant of authority to the Commission to require electric utilities to purchase power from qualifying facilities." *See PRI Energy Systems, Inc.*, 26 FERC 61,177 (1984).[4] Moreover, the Commission has stated that the question of whether qualifying facilities may be permitted to make retail sales must be resolved as a matter of state law. *Id.* at p. 61,434.[5] In sum, the fact that a facility makes retail sales does not by itself make it ineligible for certification. As discussed below, GSU's specific contentions based on this underlying assumption are without merit.

1. Ownership

UC and Fina have entered into a Joint Venture Agreement. Under this agreement, UC and Fina are to be partners and owners in the joint venture, which will be known as "Fin-Lin." Fin-Lin will construct the proposed facility, and for financing and tax reasons, may sell it to a third party, who would then lease the facility back to Fin-Lin.[6] Under such a third-party financing arrangement, Fin-Lin will continue to manage and maintain the facility and Fina will operate the facility. GSU argues that this arrangement disqualifies the Applicants from receiving certification.

---

[4] As noted in *PRI Energy System, Inc.*, the Conference Report on PURPA states,

> The conferees do not intend that this limitation on the Commission's authority will limit the states from allowing such sales [for purpose other than resale] to take place. The cogenerator or small power producer may be permitted to make retail sales pursuant to state law.

26 FERC at p. 61,434.

[5] *See also The Lawrence Park Heat, Light and Power Company*, 25 FERC ¶ 61,315 (1983).

[6] To date, the third party has not been determined. Applicants state however, that the third-party owner will not be an electric utility, electric utility holding company, or anyone owned by either.

We are not persuaded by GSU's argument that, if an entity separate from UC and Fina owns the facility certified here, any subsequent transfer of electricity under the proposed plan of operation may be a retail sale of electricity, making the owner ineligible for certification as a qualifying facility (QF) under federal and state law. The issue concerning third-party ownership and transfers of energy among the entities involved in such facilities was raised and resolved in *Alcon*. In *Alcon*, Alcon (Puerto Rico), Inc. sought certification of a facility to be owned and operated by O'Brien Energy Products, Inc. (O'Brien) and located at Alcon's pharmaceutical plant. Alcon was only the consuming entity; O'Brien was the developer. Initially the Commission, in its August 19, 1985 order, stated that O'Brien, the third-party developer, would be disqualified from owning a QF if it bought and resold back-up power. 32 FERC at p. 61,579.[7] On rehearing in *Alcon*, the Commission held that Alcon was entitled to the benefits attached to QF status. 38 FERC ¶ 61,042.

Here, Fin-Lin, on behalf of the partnership or a third-party owner, will manage and maintain the facilities. Fina, one of the partners to Fin-Lin, will operate the cogeneration facility, even under a lease arrangement. Both UC and Fina will consume power from the facility under any ownership scheme. Thus, it is clear that Fin-Lin is entitled to the benefits of QF status, even if a third party subsequently were to own the facility for financing purposes. As indicated, the fact that a facility were to make a retail sale, as alleged here, would not make it ineligible for certification as a qualifying facility. Nor do transfers of power among the owners or lessees disqualify a facility from receiving QF status. *See* 38 FERC ¶ 61,301 (1987). Therefore, we find GSU's argument to be without merit.

---

[7] *Alcon (Puerto Rico), Inc.*, 32 FERC ¶ 61,247 (1985) *order on reh'g, Alcon (Puerto Rico), Inc.*, 38 FERC ¶ 61,042 (1987).

2. Multiple Ownership

GSU alleges that multiple ownership of a qualifying facility similar to the proposed joint venture is analogous to an "industrial cooperative" which is acting as a utility without the attendant restrictions imposed by federal and state law. Therefore, the Commission would expand the scope of PURPA by allowing multiple ownership beyond that contemplated or intended by Congress.

The limitation on ownership in section 201 of PURPA and the Commission's regulations is the prohibition on the ownership of greater than 50 percent of the equity interest of the facility by an electric utility (18 C.F.R. § 292.206 (1987)). Neither Fin-Lin nor the proposed third party to be formed is or will be an electric utility, electric utility holding company, or any combination thereof. Moreover, the Commission has in the past approved facilities with more than one owner. *See e.g., Ultrapower 3*, 27 FERC ¶ 61,094 (1984). Indeed, GSU's argument is perplexing given the fact that the Commission certified a cogeneration facility in which GSU is one of four owners of the facility. *See Nelson Industrial Steam Company*, 39 FERC ¶ 61,201 (1987). Based on the above, the proposed multiple ownership of the facility does not affect its eligibility for qualification.

3. Compensation

GSU alleges that UC will supply natural gas to the facility and in return will receive only electric power. GSU contends that since the energy associated with the delivered natural gas is greater than the electric energy received by UC, the difference in energy will be used to produce steam for Fina, which is a form of compensation to Fina for providing the excess energy. Such compensation makes the transaction a retail sale according to GSU. Since UC and Fina through Fin-Lin are both owners of the facility initially, or may subsequently lease the facility from any future owner, the method in which the

electrical and thermal energy are purchased and distributed does not constitute a retail sale. Moreover, as we indicated above, qualifying facilities may make retail sales and still maintain QF status. Therefore, this contention is without merit.

4. Excess Capacity

GSU notes that one of the goals contemplated by PURPA was to increase efficiency in the use of facilities and resources by electric utilities. Due to an excess capacity situation presently existing on its system, GSU contends that granting the qualifying status to the facility would cause the loss of part of GSU's electrical load, thereby further aggravating this situation and causing the operation of system facilities at a lower efficiency.

The assertion made by GSU rests on a misunderstanding of the issue presented. The concerns raised by GSU go toward the price which it must pay for any power produced from a qualifying facility, not whether the facility qualifies for certification. This issue of price is for the state to resolve when it makes its determination of avoided costs. The issue before us is whether the facility qualifies as a cogeneration facility. Price has no role in that determination.

One of the goals of PURPA is to encourage efficiency in the use of facilities and resources by electric utilities, and to encourage efficient use of fossil fuels and greater use of renewable energy sources by both utilities and nonutilities. The Commission promulgated certain standards for cogeneration and small power production facilities which they must meet in order to obtain qualifying status and to enjoy the benefits associated with such status. Here, the proposed facility meets the criteria set forth in our regulations and accordingly, certification must be granted.

5. Texas Law

GSU alleges that both Fina and UC *may* have to meet several requirements of Texas law, one of which would be

the determination of whether such project or its owners constitute a "public utility," and whether it is necessary for the parties to obtain a certificate of public convenience and necessity for the proposed facility. Therefore, GSU points out that the instant application cannot be reviewed by the Commission until such determinations have been made.

The determination of qualifying facility status under the Commission's regulations is independent of state specific regulations and should not be delayed. Issues concerning retail electric sales are under state jurisdiction and must be resolved in the appropriate state forum. Those regulations have no relevance in the Commission's determination of qualifying status.

6. Technical Discrepancies

GSU alleges that there are several technical discrepancies between the information provided to the Texas Air Control Board (TACB) and the instant application. In response to this allegation, Applicants state that at the time the information was filed with TACB in November 1985, the design of the project was not final. However, the TACB application was drafted as such to obtain a permit that would be certain to cover the final design. Applicants state that the instant application reflects the final design of the facility which is covered by the TACB permit. QF certification is not a licensing order.[8] QF certification is a ruling based upon a set of facts presented by each applicant. QF status would be lost only if the facility were built and operated differently than represented to this Commission by the Applicants. Therefore, the Commission may review the facts as they have been represented by the Applicants.

Conclusion

GSU's protest shall be denied. We find no material issues of fact requiring further examination and GSU's re-

---

[8] *James A. Drake, et al.*, 28 FERC ¶ 61,241 (1984).

quest for hearing will also be denied. *See Citizens for Allegheny County v. FPC*, 414 F.2d 1125, 1128 (D.C. Cir. 1969). The facility satisfies the operating and efficiency standards established in section 292.205 of the Commission's regulations. (18 C.F.R. 292.205 (1987)). The facility also satisfies the ownership criteria set forth in section 292.206 of the Commission's regulations. (18 C.F.R. 292.206 (1987)). Therefore, certification as a qualifying, topping-cycle cogeneration facility shall be granted.

The Commission orders:

(A) The Application for certification of qualifying status of UC/Fina's facility filed on February 24, 1987, as amended on March 9, 1987, June 1, 1987, and August 7, 1987, is hereby granted, provided the facility operates in the manner described in the application.[9]

(B) The motions to file supplemental pleadings are hereby denied.

(C) Docket No. QF87-274-000 is hereby terminated.

---

[9] Certification as a qualifying facility serves only to establish eligibility for benefits provided by the Public Utility Regulatory Policies Act of 1978, as implemented by the Commission's regulations, 18 C.F.R. Part 292. It does not relieve a facility of any other requirements of local, state and federal law, including those regarding siting, construction, operation, licensing and pollution abatement. Certification does not establish any property rights, resolve competing claims for a site, or authorize construction.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

**Union Carbide Corporation and
Fina Oil and Chemical Company**

Docket No. QF87-274-001

(Issued December 21, 1987)

ELECTRIC RATES: Rehearing; Qualifying Facility; Ownership; Back-up Power

ORDER DENYING REHEARING

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

On October 28, 1987, Gulf States Utilities Company (GSU) filed a request for rehearing of the Commission's order issued in this proceeding on September 28, 1987.[1] In that order, the Commission granted qualifying status to Union Carbide Corporation's and Fina Oil and Chemical Company's cogeneration facility. On November 27, 1987, the Commission granted rehearing for the purpose of further consideration.

In its request for rehearing, GSU contends the Commission erred in three ways. First, GSU contends the Com-

[1] Union Carbide Corporation (Union Carbide) and Fina Oil and Chemical Company (Fina), 40 FERC ¶ 61,337 (1987).

mission should have said that transfers of back-up power by Fin-Lin (the Union Carbide/Fina partnership in this joint venture) to a third party or to Union Carbide or Fina would make the facility ineligible for QF status. Second, GSU asserts the proposed transaction would contravene the policies of PURPA. Third, GSU says the Commission should have said that the consumption portions of the facilities involved here are ineligible for back-up power.

Discussion

We will deny GSU's request for rehearing. As we noted in the original order, Union Carbide and Fina have entered into a Joint Venture Agreement. Under this agreement, Union Carbide and Fina are to be partners and owners in the joint venture, which will be known as "Fin-Lin". Fin-Lin will construct the proposed facility.[2] This arrangement is not challenged. It is the future financial arrangement that is being challenged. As planned, Fin-Lin may sell, for financing and tax reasons, the facility to a third party, who would then lease it back to Fin-Lin. Fin-Lin would continue to manage and maintain the facility and Fina would operate it.

In our earlier order, we found that Union Carbide and Fina were entitled to the benefits attached to QF status. We cited *Alcon (Puerto Rico), Inc.* (*Alcon*)[3] for the proposition that third party ownership of a facility would not disqualify the owner from qualifying facility (QF) status. We also noted that transfers of power among the owners or lessees do not disqualify a facility from receiving QF status.[4]

---

[2] Project power will be transmitted to Union Carbide on a 1.3-mile transmission line owned and operated by the same entities that own and operate the cogeneration facility.

[3] 38 FERC ¶ 61,042 (1987), *order denying reh'g*, 38 FERC ¶ 61,301 (1987).

[4] *See* Union Carbide Corporation and Fina Oil and Chemical Company, 40 FERC ¶ 61,337 at 62,030 (1987).

GSU asserts that the transfers of back-up power under the Fin-Lin partnership agreement would make the facility ineligible for QF status because they involve a retail sale. We disagree. A retail sale of power does not disqualify a facility from QF status.[5] In any event, no retail sale is involved here. This is a financial arrangement entered into with the understanding that Union Carbide and Fina would be entitled to back-up power. Receipt of back-up power is to be achieved not by a resale of power, but by a transfer of power from the owners to the lessees with the new owner serving merely as a conduit for the power.

In *Alcon*, we concluded that "nothing in the legislative history of PURPA" supported Puerto Rico Electric Power Authority's (PREPA) claim that separate ownership of the production and consumption aspects of a cogeneration facility relieves a utility from its obligations to supply back-up power. We stated:

> [in its rules] the Commission intended the load of the consuming equipment at the associated industrial site to receive back-up services from the utility. * * * Moreover, the purpose of Section 210 supports this result. That purpose is to supply back-up power to the entity consuming a QF's power, if the QF has an outage.
>
> * * * We do not believe that third-party ownership arrangements should *per se* preclude back-up power. Generally, the Section 210 right to back-up power covers both the production and consumption function, irrespective of whether they have the same ownership.

38 FERC ¶ 61,042 at 61,120.

In addition, we vacated the statement in our initial order[6] to the effect that O'Brien Energy Products, Inc., (O'Brien)

---

[5] *See* PRI Energy Systems, Inc., 26 FERC ¶ 61,177 (1984).

[6] 32 FERC ¶ 61,247 (1985).

would be disqualified from being the owner of the qualifying cogeneration facility if it purchased back-up power from PREPA and then resold it to Alcon.

In our March 26, 1987 order denying rehearing in *Alcon*,[7] we explained that the key determinations in our January 27, 1987decision "concerned the relationship between Alcon, the consumer of power owned by the QF and O'Brien, the owner and operator of the QF. *See* 38 FERC ¶ 61,042 at 61,120." We also rejected PREPA's claim that because the "producing and consuming entities" would be subject to separate ownership in this case, the entire Alcon-O'Brien arrangement was a retail sale which falls outside the protection of Section 210.[8]

Under PURPA, the consuming entities here are entitled to back-up power. To do otherwise would frustrate the intent of PURPA.[9] Here, as in *Alcon*, we refuse to draw an artificial distinction between the consumption and production of cogeneration energy where the two are a unitary and reciprocal process, and are formally given separate corporate status only for financial and tax purposes.

Accordingly, the Commission's decision to grant qualifying status to Union Carbide/Fina's cogeneration facility shall stand and GSU's request for rehearing shall be denied.

The Commission orders:

(A) GSU's request for rehearing is hereby denied.

(B) Docket No. QF87-274-001 is hereby terminated.

---

[7] 38 FERC ¶ 61,301 (1987).

[8] 38 FERC ¶ 61,301 at 61,976.

[9] *Id.*

By the Commission. Commissioner Sousa concurred in part and dissented in part with a separate statement attached.

(S E A L) Commissioner Trabandt dissented with a separate statement to be issued later.

Union Carbide Corporation and
Fina Oil and Chemical Company

Docket No. QF87-278-001

(Issued December 21, 1987)

SOUSA, ANTHONY G., Commissioner, *concurring in part and dissenting in part*:

I must respectfully dissent from that portion of the order which denies Gulf States Utilities' (GSU) request that the electric power consuming industrial facilities associated with Fin-Lin's cogeneration facility are not eligible to receive back-up power. As I explained in my dissenting statement in *Alcon (Puerto Rico), Inc.*, 38 FERC ¶ 61,042 (1987), *order denying rehearing*, 38 FERC ¶ 61,301 (1987), section 210 of the Public Utility Regulatory Policies Act of 1978 plainly provides that back-up power is available only to qualifying facilities (QFs), not to commercial or industrial entities that take QF power. In all other respects, I concur with my colleagues.

/s/ Anthony G. Sousa
Anthony G. Sousa
Commissioner

FEDERAL ENERGY REGULATORY COMMISSION
Washington, D.C. 20426

November 27, 1990

Constance L. Dupre, Clerk
U.S. Court of Appeals
for the District of Columbia
Circuit
3rd and Constitution Avenue, N.W.
Room 5423
Washington, D.C. 20001

Re: *Gulf States Utilities Co.* v. *Federal Energy Regulatory Commission*, No. 90-1006, argued November 19, 1990

Dear Ms. Dupre:

I am writing to correct a statement I made during oral argument in the above-captioned case on November 19, 1990, before a panel consisting of Judges R.B. Ginsburg, Silberman, and Sentelle.

In response to a question from the panel, I stated that the Commission's determination in its orders in this case (J.A. 180-184, 212-216, 255-264, 295-301)—that the project at issue here should be certified as a "qualifying cogeneration facility"—is subject to later challenge under state law on the ground that the relationship between the facility's production function and its consumption function may constitute a retail sale. However, upon further consultation with Commission staff, I am advised that this is not correct and does not reflect a position ever taken by the Commission. While the Commission does take the position that, under the Public Utility Regulatory Policies Act of 1978, as implemented by the Commission's regulations, its certification of a project as a "qualifying cogeneration facility" does not relieve the facility of a variety of siting, construction, and operational requirements under

state law (*see* fn. 40, J.A. 264), the determination implicit in the Commission's grant of certification—that a proposed facility's transaction *inter se* does not encompass a retail sale—would not thereafter be subject to reexamination under state law. In short, the Commission's certification that a proposed project fits the statutory criteria of "qualifying cogeneration facility" would preempt any state law which would deem the transaction within the qualifying facility itself to constitute a retail sale. Thus, the Commission would not decertify the project in that circumstance.

Since my response to the question from the panel did not accurately reflect this view, I deem it necessary to call this to the attention of the Court.

I therefore would appreciate it if you would distribute this letter to the members of the panel which heard this case.

Sincerely,

/s/ Joseph S. Davies

Joseph S. Davies
Deputy Solicitor

cc: All parties

STATUTES AND REGULATIONS INVOLVED

1. Section 3(18) of the Federal Power Act, as added by section 210 of the Public Utility Regulatory Policies Act of 1978), 16 U.S.C. § 796(18) (1988), provides in pertinent part:

> The words defined in this section shall have the following meanings for purposes of this chapter, to wit:
>
> * * * *
>
> (18)(A) "cogeneration facility" means a facility which produces—
>
> (i) electric energy, and
>
> (ii) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes;
>
> (B) "qualifying cogeneration facility" means a cogeneration facility which—
>
> (i) the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe; and
>
> (ii) is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);

2. Section 210 of the Public Utility Regulatory Policies Act of 1978, as amended, 16 U.S.C. § 824a-3 (1988), provides in pertinent part:

> (a) Not later than 1 year after November 9, 1978, the Commission shall prescribe, and from

time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production, . . . which rules require electric utilities to offer to—

(1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities[,] and

(2) purchase electric energy from such facilities. . . .

. . . Such rules may not authorize a qualifying cogeneration facility or qualifying small power production facility to make any sale for purposes other than resale.

(b) The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase—

(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and

(2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

No such rule prescribed under subsection (a) of this section shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

(c) The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to sell electric energy to any qualifying cogeneration facility or qualifying

small power production facility, the rates for such sale—

(1) shall be just and reasonable and in the public interest, and

(2) shall not discriminate against the qualifying cogenerators or qualifying small power producers.

* * * *

(*l*) For purposes of this section, the terms . . . "cogeneration facility," "qualifying cogeneration facility," and "qualifying cogenerator" have the respective meanings provided for such terms under section . . . 3(18) of the Federal Power Act.

3. 18 C.F.R. § 292.101(b) (1990) provides in pertinent part:

(b) *Definitions.* The following definitions apply for purposes of this part:

* * * *

(8) "Supplementary power" means electric energy or capacity supplied by an electric utility, regularly used by a qualifying facility in addition to that which the facility generates itself.

(9) "Back-up power" means electric energy or capacity supplied by an electric utility to replace energy ordinarily generated by a facility's own generation equipment during an unscheduled outage of the facility.

(10) "Interruptible power" means electric energy or capacity supplied by an electric utility subject to interruption by the electric utility under specified conditions.

(11) "Maintenance power" means electric energy or capacity supplied by an electric utility

during scheduled outages of the qualifying facility.

4. 18 C.F.R. § 292.201 (1990) provides:

> This subpart applies to the criteria for and manner of becoming a qualifying small power production facility and a qualifying cogeneration facility under sections 3(17)(c) and 3(18)(B), respectively, of the Federal Power Act, as amended by section 201 of the Public Utility Regulatory Policies Act of 1978 (PURPA).

5. 18 C.F.R. § 292.207 (1990) provides:

> (a) *Qualification.* (1) A small power production facility or cogeneration facility which meets the criteria for qualification set forth in § 292.203 is a qualifying facility.
>
> * * * *
>
> (b) *Optional Procedure*—(1) *Application for Commission certification.* Pursuant to the provisions of this paragraph, the owner or operator of the facility may file with this Commission an application for Commission certification that the facility is a qualifying facility.

6. 18 C.F.R. § 292.305 (1990) provides in pertinent part:

> (b) *Additional Services to be Provided to Qualifying Facilities.* (1) Upon request of a qualifying facility, each electric utility shall provide:
>
> (i) Supplementary power;
> (ii) Back-up power;
> (iii) Maintenance power; and
> (iv) Interruptible power.
>
> * * * *

Supreme Court, U.S.
FILED
JUL 11 1991
OFFICE OF THE CLERK

(2)

No. 90-1899

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

GULF STATES UTILITIES COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT UNION CARBIDE CORPORATION

PHILIP A. FLEMING *
TONI M. FINE
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2500
Counsel for
Union Carbide Corporation

* Counsel of Record

July 11, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	3
I. THIS CASE PRESENTS NO ISSUE WARRANTING ISSUANCE OF THE WRIT	3
II. THE COURT BELOW DID NOT MISAPPREHEND OR GROSSLY MISAPPLY THE STANDARD OF JUDICIAL REVIEW	4
CONCLUSION	9
APPENDIX	1a

TABLE OF AUTHORITIES

CASES: Page

Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979) 6
Alabama Power Co. v. Costle, 606 F.2d 1068 (D.C. Cir. 1979) 6
American Paper Inst., Inc. v. American Elec. Power Serv. Corp., 461 U.S. 402 (1983) 1, 2, 8
ASARCO Inc. v. EPA, 578 F.2d 319 (D.C. Cir. 1978) 6
Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ..... *passim*
Epps v. St. Mary's Hosp. of Athens, Inc., 802 F.2d 412 (11th Cir. 1986) 5
Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982) 2, 8
Gulf States Utilities Co. v. FERC, 922 F.2d 873 (D.C. Cir. 1991) ..... *passim*
Gulf States Utilities Co. v. FERC, 872 F.2d 487 (D.C. Cir. 1989) ..... *passim*
Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974) 3, 4
Mobil Oil Corp. v. EPA, 871 F.2d 149 (D.C. Cir. 1989) 5
Pauley v. Bethenergy Mines, Inc., 59 U.S.L.W. 4778 (U.S. June 24, 1991) 2
Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 3-4
Puerto Rico Elec. Power Auth. v. FERC, 848 F.2d 243 (D.C. Cir. 1988) ..... *passim*
Rust v. Sullivan, 111 S. Ct. 1759 (1991) 7
Sullivan v. Zebley, 110 S. Ct. 885 (1990) 2
Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 4

STATUTES:

16 U.S.C. § 796(18) (1988) 2
16 U.S.C. § 824a-3 (1988) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1899

GULF STATES UTILITIES COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT UNION CARBIDE CORPORATION *

STATEMENT OF THE CASE

As this Court has noted, the Public Utility Regulatory Policies Act of 1978 (PURPA or Act) was designed "to increase the utilization of cogeneration and small power production facilities," *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402, 417 (1983), and to enhance the efficient generation of

---

* Pursuant to Sup. Ct. R. 29.1, a list of subsidiaries of Union Carbide Corporation is set forth in the Appendix hereto.

energy. *See Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 750 (1982). As part of this legislative package, Congress attempted to eliminate impediments to the country's full realization of the potential of cogeneration. One such impediment removed by Section 210 of PURPA, 16 U.S.C. § 824a-3, was the likely refusal of electric utilities (such as petitioner) to sell back-up power to entities involved in cogeneration, or to purchase power that is surplus to a cogeneration project. *See* 16 U.S.C. § 824a-3(a). *See also Mississippi*, 456 U.S. at 750-51; *American Paper Institute*, 461 U.S. at 418-23.

Nowhere in PURPA did Congress elaborate on the term "facility." [1] To the extent that there is a debate over the meaning of that term, "Congress has explicitly left a gap for the agency to fill" (*Chevron*,[2] 467 U.S. at 843),[3] by broadly delegating to the Federal Energy Regulatory Commission (FERC or Commission) the authority to "prescribe . . . such rules as it determines necessary to encourage cogeneration. . . ." 16 U.S.C. § 824a-3(a), reproduced at App. 77a-78a.[4]

This case arises from a joint application filed by Union Carbide Corporation and Fina Oil and Chemical Company for certification of their cogeneration project, known as

---

[1] PURPA does define the terms "cogeneration facility" and "qualifying cogeneration facility" (*see* 16 U.S.C. §§ 796(18) and 824a-3(l), but those definitions relate to technical aspects of energy production, ownership criteria, and size, fuel use, and efficiency requirements (which are within FERC's discretion to prescribe), and they do not shed any light on what the term "facility" is intended to mean.

[2] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[3] *See also Pauley v. Bethenergy Mines, Inc.*, 59 U.S.L.W. 4778, 4782 (U.S. June 24, 1991); *Sullivan v. Zebley*, 110 S. Ct. 885, 890 (1990).

[4] References herein to "App." are to the Appendix to the Petition for a Writ of Certiorari (Petition).

"Fin-Lin," as a "qualifying facility" (QF) under PURPA. This application was contested by Gulf States Utilities Company (Gulf States), the petitioner here. After a full hearing, the Commission certified Fin-Lin as a QF, over the objection of Gulf States, which had argued, among many other things, that the term qualifying facility could not be applied to the Fin-Lin project. On initial appeal to the United States Court of Appeals for the District of Columbia Circuit, the Court of Appeals held, in *GSU I*,[5] that the Commission had not adequately explained its conclusion that the Fin-Lin cogeneration project qualified for QF status, and remanded the case to FERC for further consideration. *See* App. 56a-57a. On remand, the Commission, in a well-reasoned order (and on rehearing of that order), again reached the conclusion that certification should be granted. In *GSU II*,[6] the Court of Appeals, consistent with the teaching of this Court in *Chevron* and its progeny, found the agency's explanation sufficient, and rejected petitioner's theory that the term facility is incapable of having the meaning given to it by the agency.

REASONS FOR DENYING THE PETITION

I. THIS CASE PRESENTS NO ISSUE WARRANTING ISSUANCE OF THE WRIT.

None of the circumstances identified by this Court as warranting the grant of a writ of certiorari is present here. This Court has expressed the view that review of Commission orders is "primarily the task of the courts of appeals," *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 309 (1974), and that the Supreme Court's "'authority is essentially narrow and circumscribed.'" *Id.*, quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 766

---

[5] *Gulf States Utilities Co. v. FERC*, 872 F.2d 487 (D.C. Cir. 1989), reproduced at App. 50a-57a.

[6] *Gulf States Utilities Co. v. FERC*, 922 F.2d 873 (D.C. Cir. 1991), reproduced at App. 1a-7a.

(1968). Where Congress has placed responsibility for review "'in the keeping of the Courts of Appeals,'" "'[t]his Court will intervene only . . . when the standard appears to have been misapprehended or grossly misapplied.'" *Mobil Oil Corp.*, 417 U.S. at 310, quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951).

As shown below, the Court of Appeals did not "misapprehend" or "grossly misapply" the standard of judicial review. Nor did it announce new law, decide an important question of federal law, or make a holding in conflict with any rule of law announced by this Court, or any circuit of the Court of Appeals.

II. THE COURT BELOW DID NOT MISAPPREHEND OR GROSSLY MISAPPLY THE STANDARD OF JUDICIAL REVIEW.

1. Petitioner does not and could not contend that the Court of Appeals applied the incorrect standard in reviewing this case. *Chevron* states the rule of law clearly, and it is familiar to the courts. It requires that the reviewing court determine first "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. Where Congress has not "directly spoken to the precise question," the court must consider whether the agency's interpretation "is based on a permissible construction of the statute." *Id.* at 843.

Petitioner's argument is not that the rule was misunderstood by the Court of Appeals, but rather that it was mistakenly applied in this case. This argument is twofold: (a) that the court below did not adequately explain its holding on the *Chevron* issue because it misread its own prior decision in the case; and (b) that the court erred by not holding that the meaning of the term "facility" as used in PURPA is unambiguous, so that the agency charged with the statute's administration was precluded from applying the language of the statute in a

manner consistent with its purpose. Neither contention has any merit.

a. Petitioner's first theory is that the court below somehow improperly applied *Chevron* by mistakenly construing the opinion of a different panel of the same court earlier in the case. Thus, petitioner's real complaint is with the Court of Appeals' application of the law of the case doctrine as applied to the particular facts here—assuredly not an issue warranting a grant of certiorari. The court below observed that the *GSU I* panel had already determined that the term "facility" is not so unambiguous that FERC's interpretation of its meaning was impermissible. The court's observation is fully supported by the record. Had the *GSU I* panel found merit in petitioner's argument that the term "facility" was, on its face, inconsistent with FERC's disposition of the orders below, the court's remand to the Commission to explain its rationale under the *second* prong of the *Chevron* test, would have amounted to an empty gesture; instead, it would have *reversed* those orders. *See GSU II*, App. 4a. This is indeed the practice in the Court of Appeals. There was nothing extraordinary or unusual in the way that the Court of Appeals read its prior decision in the case.[7] Moreover, the Court of Appeals' decision in *GSU I*

---

[7] Petitioner's suggestion that the *GSU I* panel did not actually decide whether the term facility was unambiguous seems to derive from the fact that the court's holding was not expressly stated. *See* Petition at 10. To make this argument, however, petitioner has to ignore the prior precedent in the Circuit. In *Puerto Rico Elec. Power Auth. v. FERC*, 848 F.2d 243 (D.C. Cir. 1988) (*PREPA*), the Court of Appeals had unequivocally held that the "step two" analysis was appropriately undertaken when reviewing FERC's interpretation of the term "facility" as used in PURPA. *See* 848 F.2d at 247. This decision is consistent with other decisions finding that, as applied in other statutes, the term "facility" is not so clear and unambiguous as to preclude deference to the interpretation of the agency charged with administering it. *See, e.g., Mobil Oil Corp. v. EPA*, 871 F.2d 149, 152 (D.C. Cir. 1989); *Epps v. St. Mary's Hosp. of Athens, Inc.*, 802 F.2d 412, 414-15 (11th Cir. 1986);

was foreordained by its decision in *PREPA*, which held that the term "facility" as used in the Act does not have a clear and unambiguous meaning. *See* 848 F.2d at 247.

Moreover, the court below did not rely solely upon the precedent established by *GSU I*. Rather, it went a step further and *expressly revisited the issue on its merits*, and reached the same conclusion. *See* App. 4a-5a. If petitioner's argument is really that the court's treatment of the question was not lengthy enough (*see* Petition at 8, 9), petitioner has set forth nothing to support the proposition that a Court of Appeals is required to set forth its analysis of a plain language issue in some requisite detail. The court was not required to set forth an elaborate explanation why the term facility would be interpreted in a manner consistent with the broad purposes of the Act, especially given that the question was squarely resolved in the Circuit by *PREPA*, and was also implicit in the *GSU I* holding.

b. To the extent petitioner addresses directly the agency's authority to apply the statute as it has, petitioner argues that the court below erred by not holding that the term "facility" has a clear and unambiguous meaning, which cannot be squared with the interpretation afforded to it by the Commission and upheld by the Court of Appeals. *See* Petition at 11-13 and n.8. Petitioner's argument is that *Chevron* was not properly followed here because the statute is so clear that the agency could not interpret it as it had, affording the term facility a broad definition which furthered the purpose of the Act. But at the heart of *Chevron* is the proposition that, in the absence of any clear indication that Congress has expressed a contrary intention, the courts are to defer to the agency if its interpretation is reasonable and not inconsistent with the statutory purpose. *See, e.g., Chevron,*

Alabama Power Co. v. Costle, 636 F.2d 323, 396 (D.C. Cir. 1979); *Alabama Power Co. v. Costle*, 606 F.2d 1068, 1077 (D.C. Cir. 1979); *ASARCO Inc. v. EPA*, 578 F.2d 319, 325-26 (D.C. Cir. 1978).

467 U.S. at 842-43. *See also Rust v. Sullivan*, 111 S. Ct. 1759, 1767 (1991). The issue that was presented below is assuredly not one upon which it might fairly be said that Congress had spoken. Read in context, there is no reason why a facility can only mean a single building or a single site, rather than a single integrated enterprise, working together to produce a single product (even though some aspects of the process are spread apart). Petitioner has not offered any explanation why Congress would want to limit the term facility to a single building or group of buildings, particularly in light of the broad purpose of the Act to encourage cogeneration. The Court of Appeals properly found that no clear and unambiguous congressional intention was evinced to preclude the Fin-Lin venture from being found to be a "facility," and correctly deferred to the agency's interpretation, which is not only reasonable, but which also advances PURPA's goals.

2. Nor is there any basis for petitioner's contention that the court of appeals erred with respect to its holding on the retail sale issue. *See* Petition at 13-14. Petitioner's argument in this regard rests on a fundamental misconstruction of the *GSU I* court's decision. Contrary to the argument set forth in the Petition, the *GSU I* court did *not* "[ask] FERC to explain on remand why the sale of power to Union Carbide for consumption at its isolated plant was not a 'retail sale'" (*id.* at 13). In fact, the court in *GSU I* did not address the retail sale issue at all. There thus could be no "irreconcilable" (*id.* at 14) conflict between the *GSU I* and *GSU II* panels for this Court to resolve.

There is also no basis for petitioner's contention that the court below improperly refused to make a ruling on the merits of the retail sale question. The court simply had no reason to elaborate on its ruling because, consistent with the precedent established in *PREPA*, such a question was premature at the certification stage. App.

3a n.1.[8] The failure of a Court of Appeals to say anything about some argument raised by the petitioner below, does not suggest that the Court of Appeals has thereby created a rule of law, with sufficient precedential value, to warrant this Court's attention. In fact, the contrary is true. The disinclination to elaborate on that particular theory says something about the Court of Appeals' view of the importance of the issue, and prevents the court's disposition of the issue—whatever it might have been—from having any effect beyond this case. Although petitioner says that a more definitive ruling was required because of the views expressed by the Commission's Deputy Solicitor (*see* Petition at 13-14), the mere fact that the Commission may take a view of the impact of QF certification that differs from the court's interpretation, does not change this result, or present any issue appropriate for this Court's review.

3. This case does not present any other issue of importance which would warrant review by this Court. Contrary to petitioner's suggestion, the orders below are not "the first authoritative construction of the scope of the cogeneration program mandated by PURPA." Petition at 15. Rather, as petitioner concedes (Petition at 15 and n.14), the D.C. Circuit's holding in *PREPA* provides critical guidance as to the proper construction of PURPA, as do several earlier opinions of this Court. *See American Paper Inst.*, 461 U.S. 402; *Mississippi*, 456 U.S. 742. Indeed, this case involves, at best, a single narrow issue associated with the application of that Act

---

[8] Petitioner's reproduction of footnote 1 of the opinion below contains a typographical error. It should read as follows:

> Petitioner also argues that FERC has violated the Act by implicitly authorizing an actual retail sale of power from Fin-Lin to Union Carbide. In *Puerto Rico Elec. Power Auth. v. FERC*, 848 F.2d 243 (D.C. Cir. 1988), however, we said that whether or not that transaction was a retail sale was not properly before us; it should be raised first before the state regulatory agency.

—and no question of law that would warrant this Court's attention.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

PHILIP A. FLEMING *
TONI M. FINE
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2500
Counsel for
Union Carbide Corporation

July 11, 1991

* Counsel of Record

APPENDIX

APPENDIX

APPENDIX

LISTING OF SUBSIDIARIES PURSUANT TO SUPREME COURT RULE 29.1

The following is the most current listing of subsidiaries of Union Carbide Corporation (Union Carbide). Excluded are those that are wholly owned by Union Carbide.

Ace Limited
Ace Polymer Company, Limited
ACM Services, Inc.
Agri-Diagnostics Associates
Agromore, Ltd.
Alestra Energy Company
American Acetyls
Andaluza de Gases S. A.
Anidride Carbonica Italia
Argon, S. A.
Arlasa, S. A.
B. H. Gases Comercio e Participacoes Ltda
Baker Cummins Dermatologicals, Inc.
BiTec Southeast, Inc.
Cane Associates Limited d/b/a Welders Supply Company
Carbide Hashim Industrial Gases Company
CARBITALIA S. p. A.
Carbographite Limited
Carburo del Cinca S. A.
Clark Chemical Industry Company, Ltd.
Commercial Alcohols Limited
Commercial Alcohols Reg'd.
Compania Navarra de Oxigeno S. A.
Compressione Gas Tecnici S. p. A.
Concoat Integrated Technologies Limited
DCS Capital Partnership
E.S.A. S. r. L.
ELARC—Equipmentos de Soldagem Eletrica Ltda.
Elektrode Maatskappy Van Suid-Afrika (Eiendoms) Beperk EMSA

Elocar Company
EMBRAL—Empresa Brasileira de Reflorestamento e Agro-Pecuaria Ltda.
Excel Limited
F.R.A.O—Finaziaria S. p. A.
F.R.A.O—Industrie
Ferrygas
Gacesa
Gastronomia Basks
Genesis Systems Group, Ltd.
GenEx, Ltd.
Greenwich Oil Corporation
Hexatec Polymers
Hispano Sueca de Soldadura S. A.
Hokuetsu Kasei (Chemical) Co., Ltd.
Hokuetsu Kasei Shoji (Trading) Co., Ltd.
IGI—Italiana Gas Industriali S. p. A.
Indugas N. V.
International Diagnostic Systems Corp.
Iwatani Industrial Gases, Limited
Iwatani-UCISCO Corporation
IWECO
Keren Limited
Kyowa Shokai Co., Ltd.
Linde de Mexico, S. A. de C. V.
Locatelli Ossigeno S.r.L.
Medigas Canada Inc.
Medigas Homecare Services Lakehead Ltd.
Miami Welding Supply, Inc.
Nepal Battery Company Limited
Niject Service Company
Nippon Unicar Company Limited
Osaka Hokuetsu Kasei Co., Ltd.
Oxigeno del Norte, S. A.
Oxigenus, S. A.
Oximesa, S. A.
Oximinas Ltda.
OXISUD, S. p. A.
Oxygene Rioux Inc.

Parylene Japan K. K.
Petromont and Company, Limited
Petromont Inc. (Management Company)
Poly Pack
Polypropylene Partnership
Quimica Basica, S. A.
R. C. Development Associates Limited Partnership
Rhee (Beheer) B. V.
Rivoira S. p. A.
S. A. Rapidox Gases Industriais Ltda.
S. A. Rapidox Rio Comercio e Participacoes
S. A. White Martins
S. p. A. Societa Emiliana Ossigeno S.E.O.
S.A.C.I. S. p. A.
Saguenay Oxygene (1968) Ltee.
Sankyo Plastics Co., Limited
Seadrift Polypropylene Company
Seoul Cold Air Products Company, Limited
Shanghai Guang Yang Shoes Co.
Shanghai UCC-UOP Molecular Sieve Co., Ltd.
Shawinigan Pipeline Reg'd.
SIAD—Societa Italiana Acetilene e Derivati S. p. A.
Societa Portuguesa del Oxigenio, Lda.
Suzhou Su Hong Craft Shoes Co.
Techno B. N. V.
TECHNOPROJECT IND S.r.L.
Tenngasco Gas Gathering Company
Thermo
Tsuda Wire & Cable
UCAR Carbon S. A.
UCAR Interam/EXXON
Umetco/H-B Limited Partnership
Union Carbide—Atlas Joint Venture
Union Carbide—Hecla Joint Venture
Union Carbide—Rajah Joint Venture
Union Carbide—Taminco Joint Venture
Union Carbide Canada Limited

Union Carbide Comercial Chile Ltda.
Union Carbide Hellas Limited
Union Carbide India Limited
Union Carbide Lanka Limited
Union Carbide Marble Care, Inc.
Union Carbide Mexicana, S. A. de C. V.
Union Carbide Pakistan Limited
Union Gas Company Limited
Union Marine Transport Company
Union Polymers Sdn. Bhd
Union Showa K. K.
United States Welding, Inc.
UOP
UOP Management Services (Saudi Arabia) Ltd.
Visking do Brasil S. A.
Wako Jushi Co., Ltd.
Wellnite Services
Wetmore Welding Supplies Limited
White Martins Administracao e Investimentos Ltda.
World Ethanol Company
Zimbabwe Mining and Smelting Company (Private) Limited

Supreme Court, U.S.
FILED
AUG 8 1991
OFFICE OF THE CLERK

(3)

No. 90-1899

In the Supreme Court of the United States

OCTOBER TERM, 1991

GULF STATES UTILITIES COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

WILLIAM S. SCHERMAN
General Counsel

JEROME M. FEIT
Solicitor

JOSEPH S. DAVIES
Deputy Solicitor

THOMAS J. LANE
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

QUESTIONS PRESENTED

1. Whether the court of appeals properly deferred to the Federal Energy Regulatory Commission's construction of the term "facility," as used in Section 201(18) of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 796(18).

2. Whether the court of appeals properly determined that petitioner's claim that FERC in this case improperly attempted to regulate the retail sale of electricity, in contravention of 16 U.S.C. 824a-3, was not ripe for judicial review.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

American Paper Institute v. *American Elec. Power Corp.*, 461 U.S. 402 (1983)	2
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	8
FERC v. *Mississippi*, 456 U.S. 742 (1982)	2, 11
Gulf States Utilities Co. v. *FERC*, 922 F.2d 874 (D.C. Cir. 1991)	10
PRI Energy Systems, Inc., 26 F.E.R.C. ¶ 61,177 (1984)	3
Puerto Rico Elec. Power Auth. v. *FERC*, 848 F.2d 243 (D.C. Cir. 1988)	7, 8, 9, 10

Statutes and regulations:

Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (16 U.S.C. 796 *et seq.*)	2
§ 201, 16 U.S.C. 796	8
§ 201(18), 16 U.S.C. 796(18)	4, 6
§ 201(18)(A), 16 U.S.C. 796(18)(A)	2
§ 201(18)(B), 16 U.S.C. 796(18)(B)	3
§ 210(a), 16 U.S.C. 824a-3(a)	2, 7, 10
18 C.F.R.:	
Section 292.101(b)(8)-(11)	3
Section 292.203(b)	3
Section 292.205(a)	3
Section 292.205(b)	3
Section 292.206(a)	3
Section 292.206(b)	3

Statutes and regulations—Continued: Page

Section 292.303 3
Section 292.305 3
Section 292.305(b)(1) 3

Miscellaneous:

Black's Law Dictionary (5th ed. 1979) 9
Webster's Third New Int'l Dictionary (1986) 9

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1899

GULF STATES UTILITIES COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 922 F.2d 873. The orders of the Federal Energy Regulatory Commission (Pet. App. 11a-28a, 29a-49a) are reported at 48 F.E.R.C. ¶ 61,130, and 49 F.E.R.C. ¶ 61,209, with concurring opinions (Pet. App. 24a-28a, 38a-49a) ~~are~~ reported at 49 F.E.R.C. ¶ 61,178 and 50 F.E.R.C. ¶ 61,195 (1990).

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1991. A petition for rehearing was denied on March 14, 1991. Pet. App. 8a. The peti-

tion for a writ of certiorari was filed on June 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. As this Court noted in *FERC* v. *Mississippi*, 456 U.S. 742, 750 (1982), the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (PURPA), "seeks to encourage the development of cogeneration * * * facilities"—*i.e.*, facilities that engage in the production of electricity and useful heat or steam in circumstances where some or all of the heat would otherwise be dissipated into the environment. See also *American Paper Institute* v. *American Elec. Power Corp.*, 461 U.S. 402, 414-415 (1983). To this end, Section 210(a) of PURPA, 16 U.S.C. 824a-3(a), directs the Federal Energy Regulatory Commission to prescribe rules under which electric utilities are required to provide power to and purchase surplus power from "qualifying cogeneration facilities." Section 201(18)(A) of PURPA, 16 U.S.C. 796(18)(A), defines a "cogeneration facility" as "a facility which produces—(i) electric energy, and (ii) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes." It also defines a "qualifying cogeneration facility" (a "QF") as a cogeneration facility that:

> (i) the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe; and (ii) is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely

from cogeneration facilities or small power production facilities).

16 U.S.C. 796(18)(B).

Pursuant to its rulemaking authority, the Commission has established two prerequisites to the certification of a "cogeneration facility" as a "qualifying [cogeneration] facility." 18 C.F.R. 292.203(b). First, the facility must meet certain operating and efficiency standards. See 18 C.F.R. 292.205(a) and (b). Second, not more than 50 percent of the equity in the facility may be owned by an electric utility. See 18 C.F.R. 292.206(b).[1] If these two criteria are met, a "cogeneration facility" must be certified as a "qualifying cogeneration facility." See *PRI Energy Systems Inc.*, 26 F.E.R.C. ¶ 61,177 (1984). The Commission's rules require electric utilities to interconnect with the QF, purchase energy from the QF, and provide power to it in certain circumstances. 18 C.F.R. 292.303 and 292.305(b)(1).[2]

2. On February 24, 1987, Union Carbide Corporation (Union Carbide) and Fina Oil and Chemical Company (Fina) filed a joint application requesting

---

[1] 18 C.F.R. 292.206(a) provides that a "cogeneration facility * * * may not be owned by a person primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities * * *)." In turn, the regulations define "ownership" as ownership of "more than 50 percent of the equity interest in the facility." 18 C.F.R. 292.206(b).

[2] FERC has promulgated rules requiring utilities to sell power to qualifying cogeneration facilities to supplement the facility's own power production and to replace power lost by the facility during scheduled maintenance or unscheduled outages. See 18 C.F.R. 292.305 and 18 C.F.R. 292.101(b)(8)-(11).

the Commission to certify a proposed cogeneration facility to be owned by both as a QF. Pet. App. 58a. The application stated that Fina and Union Carbide had entered into a partnership known as "Fin-Lin" to construct the facility and oversee its management. The facility's power-producing component would produce both electricity and industrial-process steam, and would be located at the site of Fina's oil refining plant in Port Arthur, Texas. *Id.* at 16a, 52a. Both steam and electric power produced at the facility would be used to operate the Fina refining plant, located directly adjacent to the cogeneration unit. In addition, electric power produced by the facility would be transmitted through a private 1.7 mile transmission line to a nearby Union Carbide plant in Groves, Texas. *Id.* at 52a-53a.

Petitioner, the utility in whose service area the facility would be located, opposed inclusion of the Union Carbide plant in the QF. In pertinent part, petitioner argued that the Union Carbide plant was a customer purchasing electricity from the cogeneration facility and not itself a part of that facility. Pet. App. 60a.

3. On September 28, 1987, the Commission issued an opinion certifying the proposed facility, including the Union Carbide plant, as a "qualifying cogeneration facility" within the meaning of Section 201(18) of PURPA, 16 U.S.C. 796(18). Pet. App. 58a-68a. On review, the court of appeals found that the Commission had failed to provide "a coherent explanation for its determination that the Union Carbide plant is so integral a part of the Fin-Lin facility as to entitle it to back-up power from Gulf States." *Id.* at 56a. The court therefore remanded the case to the Commission for further explanation; it also urged the Commission to give guidance as to the criteria

it would employ in making QF determinations in the future. Pet. App. 57a.

4. On remand, the Commission found that Union Carbide's plant "is so integral a component of the cogeneration facility" that it should be certified as part of a QF. Pet. App. 19a. The Commission articulated four factors on which it based its decision:

> (1) whether the power consuming component is owned by the owner or operator of the power producing component;
> (2) the geographic location of the consuming component served by the power producing component;
> (3) functional characteristics; for example, whether the power line used to transmit energy is a private line that is part of an integrated industrial operation; and
> (4) the presence of a customer/supplier relationship between the applicants.

Id. at 19a-20a (footnote omitted). Applying these factors, the Commission concluded that (1) Union Carbide was a part owner of the power production components of the facility; (2) Union Carbide's plant was located only 1.7 miles away from the Port Arthur power production equipment; (3) the line used to transmit electrical power to Union Carbide was a private transmission line—analogous to the internal wiring in a single plant—jointly owned by Fina and Union Carbide with only one connection point to petitioner's transmission system, thus indicating that the components of the project were "part of an integrated industrial operation"; and (4) there was a longstanding supplier-customer relationship between Union Carbide and Fina before they entered into this joint venture, since the Union Carbide plant

has long been Fina's major supplier of nitrogen, a critical raw material in Fina's process.[3] *Id.* at 20a-22a. The Commission therefore concluded that the project should be granted QF status. See *id.* at 20a-23a, 33a-37a.

5. The court of appeals affirmed. Pet. App. 1a-7a. The court first rejected petitioner's argument that FERC had failed to accord the word "facility" in Section 201(18) of PURPA, 16 U.S.C. 796(18), its plain meaning. Pet. App. 4a. The court explained that, if the earlier panel that considered the case had believed Gulf States' argument that the term "facility" was unambiguous, it would not have remanded the case to FERC. The court observed:

> In any event, the word "facility" is not defined in the statute, nor in the legislative history, and we do not think it has a "plain meaning" that would preclude its application to this arrangement. Like "stationary source," it is an imprecise term that an administrative agency is given implicit authority to construe, *see Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 843-45 (1984), and we must therefore defer to a reasonable interpretation and application of such a term.

Pet. App. 4a-5a.

Having found that the meaning of the term "facility" is not clear on the face of the statute and that *Chevron* deference is required, the court concluded that the Commission's four-pronged test, as applied to the facts of this case, is a "reasonable" interpre-

---

[3] The Commission noted that "just as the electricity will be distributed to Union Carbide over a 1.7-mile-long power line, the nitrogen is presently piped to Fina via an approximately 1.7-mile-long pipeline." Pet. App. 22a.

tation of the statute. Pet. App. 5a-7a. As the court observed, "the task of measuring the degree of integration between production and consuming units is not susceptible to any bright line rules—petitioner's counsel was not able to suggest one—and therefore we are hardly in a position to reject the Commission's reasoning." *Id.* at 6a.

Petitioner had also alleged that the transmission of electricity to the Union Carbide plant was a retail sale—a "sale for purposes other than resale"—beyond FERC's jurisdiction under PURPA Section 210(a), 16 U.S.C. 824a-3(a). Relying on its earlier decision in *Puerto Rico Elec. Power Auth.* v. *FERC*, 848 F.2d 243, 249 (D.C. Cir. 1988), the court did not reach this issue, holding instead that the issue was "not properly before us" and "should be raised first before the state regulatory agency." Pet. App. 3a n.1.

ARGUMENT

1. Petitioner first contends (Pet. 9-13) that the court of appeals did not adequately address its claim that the Commission's construction of the statutory term "facility" in this case is not entitled to *Chevron* deference because that term is not broad enough to cover both the Union Carbide plant and the other components of the proposed QF. According to petitioner, the court below erred by assuming that, since the previous panel remanded to the Commission for further explantion of its reasons for including Union Carbide within the QF, that panel must not have viewed the statutory language to exclude unambiguously the Union Carbide plant. Petitioner's contention that the court of appeals misread its own prior opinion is mistaken and would not in any event warrant further review.

First, the court of appeals was correct in concluding that the earlier panel must have found that the term "facility" was ambiguous. Under the well-settled principles articulated in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), it is only after a court determines that the language of a statute is not plain that it defers to the agency's interpretation. Accordingly, if the term "facility" could not be construed to be broad enough to include the Union Carbide plant in this case, a remand to the Commission to explain its reasoning would have been pointless.

In any event, the court of appeals independently inquired whether the term "facility" had an unambiguous meaning, concluding that "the word 'facility' is not defined in the statute, nor in the legislative history, and we do not think it has a 'plain meaning.'" Pet. App. 4a. Any possible error in the court's interpretation of its own earlier opinion in this case therefore had no effect on its decision.

Finally, the court of appeals was correct in concluding that the meaning of the term "facility" does not unambiguously exclude the Commission's interpretation of that term as applied to this case.[4] In-

---

[4] Indeed, prior to either panel's decision in this case, the District of Columbia Circuit had already determined in *Puerto Rico Elec. Power Auth.* v. *FERC*, 848 F.2d 243 (1988), that the term "facility" in Section 201 of PURPA is not unambiguous and that deference to the Commission's view of its meaning was required. Although petitioner correctly asserts (Pet. 11 n.8) that a term may be ambiguous as applied to a particular set of facts and unambiguous when applied to another, the issue in *Puerto Rico Electric*—whether a power-consuming plant and a power-producing plant that is adjacent to it but under different ownership may together form a single QF—is closely related to the issue in this case—whether a power-consuming plant and a power-producing plant that is not

deed, both dictionary definitions of "facility" cited by petitioner as evidence of the ordinary usage of the term are consistent with the Commission's interpretation. Pet. 3 & n.1. In particular, the thrust of the Commission's decision was that, in the words of one of the definitions cited by petitioner, the proposed QF is a "collection of integrated elements which has been designed and constructed to achieve some purpose." *Black's Law Dictionary* 531 (5th ed. 1979). The other dictionary defines "facility" as "something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end." *Webster's Third New Int'l Dictionary* 812-813 (1986). In light of the long-standing integration between the Union Carbide and Fina facilities noted by the Commission, that definition could hardly be said to preclude the Commission's interpretation of the term in this case.

2. Petitioner contends (Pet. 13-14) that the court of appeals "erred in concluding that the question of the status of the Fin-Lin/Union Carbide transaction as a retail sale was not properly before it." In *Puerto Rico Electric*, 848 F.2d at 248-249, the court of appeals had similarly refused to decide whether the transmission of electric power from one component of a QF to another was a "retail sale." In this case, the court simply relied on *Puerto Rico Electric* to find that the issue should "be raised first before the state regulatory agency." Pet. App. 3a n.1.[5]

---

geographically contiguous to it but is partly owned by it may together form a single QF.

[5] Petitioner's transcription of footnote 1 of the court of appeals' opinion (Pet. App. 3a) contains a typographical error. The footnote should read:

> Petitioner also argues that FERC has violated the Act by implicitly authorizing an actual retail sale of power from

The question that petitioner believes the court of appeals should have decided has two aspects: first, whether the FERC order certifying the QF authorized the transmission of electricity from the producing component of the QF to all of the consuming components (including the Union Carbide plant), and, second, whether, if it did, transmission of electricity from one component of the QF to another is a "sale for purposes other than resale" within the meaning of PURPA Section 210(a). With respect to the first question, the Commission's rules concerning QFs do not expressly govern the allocation of electricity within a QF. Nor do any of the Commission's orders in this case expressly require or forbid one part of the QF to supply electric power to another. The court of appeals thus may well have believed it appropriate to defer resolution of this question until it is raised in a more concrete factual setting.

Even if the court of appeals should have reached this issue, however, it is clear that, as the Commission explained in a post-argument submission to the court of appeals, "implicit in the Commission's grant of certification" to a QF is the determination "that a proposed facility's transaction *inter se* does not encompass a retail sale." See Pet. App. 76a; see also Pet. App. 64a-66a. Indeed, the question whether transmission of electric power within the QF constitutes a "sale for purposes other than resale" under 16 U.S.C. 824a-3(a) is at bottom no different from the first question presented by petitioner: whether

---

Fin-Lin Union Carbide. In *Puerto Rico Elec. Power Auth.* v. *FERC*, 848 F.2d 243 (D.C. Cir. 1988), however, we said that whether or not that transaction was a retail sale was not properly before us; it should be raised first before the state regulatory agency.

Gulf States Utilities Co. v. *FERC*, 922 F.2d 873, 874 n.1 (D.C. Cir. 1991).

the various component parts of the Fin-Lin project may together be certified as a single "facility" under PURPA. If, as the Commission found, those component parts do compose one facility, then transmissions of electric power within the QF do not implicate a distinct "buyer" and "seller," and consequently cannot be characterized as a "*sale* for purposes other than resale" (emphasis added). All of the facts that support the Commission's determination that there is a single facility—including the joint ownership of the QF and the fact that the cogenerated power will never leave the property of either Fina or Union Carbide—equally support the conclusion that there is no retail "sale" for PURPA purposes when electricity is transmitted within the QF.

3. Finally, petitioner claims (Pet. 14-16) that the Commission has "distorted" congressional goals in enacting PURPA by giving rise to the possibility that increasing use of cogeneration could "compromise the utilities' ability to serve their remaining customers economically." Here, too, petitioner's claims are flawed.

This Court has already concluded that Congress's overriding concern in enacting PURPA was to "lessen the country's dependence on foreign oil * * * and to control consumer costs." *FERC* v. *Mississippi*, 456 U.S. at 746. In enacting PURPA, Congress recognized that increased electric energy production by QFs could replace more expensive and less efficient generation by utilities and would help avoid or defer construction of generating capacity. See *FERC* v. *Mississippi*, 456 U.S. at 750, 757. In short, when Congress enacted PURPA, it was clearly cognizant of the possibility that QF certification could "lead to diversion of a large portion of existing utility industrial load to cogeneration by multi-customer qualify-

ing facilities"—the very result here complained of by petitioner (Pet. 16). That Congress nonetheless enacted the statute underscores the invalidity of petitioner's assertion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

WILLIAM S. SCHERMAN
General Counsel

JEROME M. FEIT
Solicitor

JOSEPH S. DAVIES
Deputy Solicitor

THOMAS J. LANE
Attorney
Federal Energy Regulatory Commission

AUGUST 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 45011